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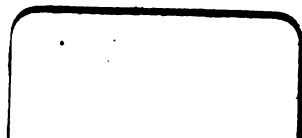


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IRISH CHANCERY REPORTS,  
BEING A SERIES OF REPORTS OF  
CASES  
ARGUED AND DETERMINED IN  
THE HIGH COURT OF CHANCERY  
AND  
THE ROLLS COURT,  
IN  
IRELAND,  
DURING THE YEARS 1850, 1851 AND 1852.

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Rolls:  
By EDWARD SHIRLEY TREVOR, Esq.

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# JUDGES AND LAW OFFICERS

*During the period of these Reports.*

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## HIGH COURT OF CHANCERY.

*Lord Chancellor*.—The Right Hon. MAZIERE BRADY.

*Master of the Rolls*.—The Right Hon. THOMAS BERRY CUSACK SMITH.

## ATTORNEYS-GENERAL.

The Right Hon. JAMES HENRY MONAHAN.

The Right Hon. JOHN HATCHELL.

## SOLICITORS-GENERAL.

JOHN HATCHELL, Esq.

HENRY GEORGE HUGHES, Esq.

## SERJEANTS.

JOSEPH STOCK, Esq., LL.D.

JOHN HOWLEY, Esq.

JAMES O'BRIEN, Esq.

JONATHAN CHRISTIAN, Esq.

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The following changes took place:—In Trinity Term 1850 JAMES STRATHEARNE CLOSE, Esq., and WILLIAM KEOGH, Esq., were called within the Bar. In Trinity Term 1851 Serjeant Stock resigned, and JONATHAN CHRISTIAN, Esq., Q. C., was appointed Her Majesty's third Serjeant at Law. In the Vacation after Trinity Term 1850, The Right Hon. JOHN DOHERTY, Lord Chief Justice of the Common Pleas, died, and was succeeded by The Right Hon. JAMES HENRY MONAHAN, Her Majesty's Attorney-General; JOHN HATCHELL, Esq., Her Majesty's Solicitor-General, was appointed Attorney-General, and HENRY GEORGE HUGHES, Esq., Q. C., was appointed Solicitor-General. At the Sittings after Trinity Term 1851 a patent of precedence was conferred on The Right Hon. RICHARD WILSON GREENE, Q. C.

C O R R I G E N D A.

Page 190, line 18, marginal note, for (.) read (,).

- „ 190, line 28, marginal note, after "part thereof," insert "should be unpaid for three months after the times on which the same ought to be paid, though not demanded."
- „ 209, line 26, for "1804," read "1834."
- „ 211, last line, for "several measures," read "similar measures."
- „ 274, line 5, for "sell," read "set."
- „ 410, line 2, from end in marginal note, *dele* "that."
- „ 579, lines 7 and 8, in marginal note, for "4 & 5 Vic.," read "3 & 4 Vic."

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CHANCERY REPORTS,  
BEING A SERIES OF  
CASES ARGUED AND DETERMINED  
IN THE  
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AND  
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BURKE v. KILLIKELLY.

(*Chancery.*)

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May 11, 13.

THIS was a supplemental suit against D. M. Killikelly and Thomas Gillespie and Eliza his wife for the purpose of binding them by the proceedings in the cause of *Burke v. Concannon*, and thus to make title to a purchaser of lands directed to be sold by the decree of the 20th of June 1846 in the latter cause. The plaintiff was assignee of a judgment for £2000, obtained against Henry Concannon. The defendant Killikelly was also assignee of a judgment against the same conuzor, and the defendant Eliza Gillespie was administratrix of Thomas O'Reilly, who was also assignee of a judgment against the same conuzor. The plaintiff filed his original bill in 1817 for the administration of the assets of Henry Concannon, for a sale of his real estate, and to set aside a voluntary deed of settlement of the real estate, executed upon the 31st of August 1805, as fraudulent and void against the creditors of Henry Concannon. After various proceedings and numerous abatements a decree for a sale was obtained on the 20th of June 1846.

In the administration of assets judgments rank inter se according to the time of their entry upon the roll under the statute 3 G. 2, c. 7 (Ir.)

Statement.

A person named John J. Cruice, on the 2nd of December 1812, filed a bill to raise the amount secured by a judgment (which was subsequently assigned to the defendant Killikelly), and obtained a decree for an account in 1817. In 1820 he assigned the judgment

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and decree to the defendant Killikelly, who took no proceedings until 1837, when he filed a bill to obtain the benefit of the decree of 1817, and for a sale of the lands. A decree for a sale was pronounced on the 27th of January 1841, and in the same month a receiver was appointed in that cause, who, up to the hearing of the present cause, still continued in receipt of the rents. Thomas O'Reilly was the only reported creditor in *Killikelly v. Concannon*. No further proceedings were taken in that cause to enforce a sale, nor was the deed of 1805 impeached, or the necessary parties brought before the Court to effect a sale. Both Killikelly and O'Reilly were cognizant of the proceedings in *Burke v. Concannon*, and had been required by notice to prove their demands under the decree in that cause, and also had been served with a notice similar to that in *Barrett v. Birmingham* (*a*), calling upon them to enter into a consent to be paid according to their priority, and to be bound by the proceedings in *Burke v. Concannon*, which notices were proved in the present cause. The judgments vested in the plaintiff and in the defendant Gillespie were both entered on the 15th of December 1810. The judgment vested in the defendant Killikelly was entered on the 17th of December 1810. Henry Concannon, the debtor, had died subsequently to the first day of Michaelmas Term 1810 and previously to the entry of any of the three judgments; they were, however, all three entered in pursuance of warrants of attorney for that purpose executed by him in his lifetime. The defendant Killikelly in this cause relied on the Statute of Limitations in bar of the plaintiff's demand, and also alleged that it had been paid off. A decree to account was pronounced in November 1848, by which it was referred to the Master to take an account of the sums due to the plaintiff and defendants, with liberty to the parties respectively to surcharge and falsify their mutual demands as found under the decrees in *Burke v. Concannon* and *Killikelly v. Concannon*, and the defendant Killikelly had liberty to rely on the Statute of Limitations in bar of the plaintiff's demand. The Master (Henn) found by his report that the sums claimed by all the parties were due to them, and that the demands of the plaintiff and of the defendant Gillespie consti-

(*a*) 1 Ir. Eq. Rep. 417.

tuted the first charge upon the lands, and that the demand of the defendant Killikelly was the second charge upon them.

To that report the defendant Killikelly took four exceptions. Three of those exceptions, which insisted upon the bar of the Statute of Limitations, were overruled without argument. The fourth exception claimed a priority for Killikelly's demand over that of the plaintiff, and an equality for it with that of Gillespie.

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*Mr. Christian* and *Mr. Close*, for the defendant Killikelly.

*Argument.*

The whole of a Law Term is deemed but one day, and all legal acts have relation thereto; therefore by general intendment every judgment relates to the first day of the Term on which it is entered. There is accordingly neither at Common Law or Equity any priority between judgments of the same Term *inter se*: *Doe d. M'Iwaine v. Magill* (a); *Abbott v. Stratten* (b); *Smith v. Chichester* (c); *O'Brien v. Scott* (d); *Robinson v. Tonge* (e). The latter case shows that judgments on warrants of attorney, entered, as here, after the death of the debtor, relate back to the first day of the Term on which the debtor was alive, and that there exists no priority between the creditors. The statute 3 G. 2, c. 7, commonly called the Docketing Act, in the 2nd section enacts that all "such judgments (viz., those docketed under the 1st section), as against purchasers or mortgagees *bona fide* for valuable consideration, of lands, tenements or hereditaments to be charged thereby, shall, in consideration of law, be judgments only from such time as they shall be brought into the proper office to be entered of record and signed by the proper officer on such docket or record as aforesaid, and shall not have any preference against heirs, executors or administrators in their administration of their ancestors', testators' or intestates' estates, but from the time aforesaid." The cases already cited show that in the construction of this and the English statute, 4 & 5 W. & M. c. 20, the word "preference" is to be referred to the

(a) 1 Hud. & Br. 396, n.

(b) 3 Jo. & Lat. 603; S. C. 9 Ir. Eq. Rep. 233.

(c) 12 Ir. Eq. Rep. 579. (d) 11 Ir. Eq. Rep. 63.

(e) 3 P. Wms. 398.

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priorities as between purchasers, &c. and judgment creditors, but not as between judgment creditors *inter se*. Counsel on this part of the argument referred to *Hickey v. Hayter* (a), *Steele v. Rorke* (b), *Hall v. Tapper* (c), *Smith v. O'Reilly* (d) and *Jeffreson v. Morton* (e).

Argument.

The defendant Killikelly having obtained an earlier decree in his suit than the plaintiff here, has gained a priority over his judgment. A decree has the effect of a judgment: *Ashley v. Pocock* (f); *Morrice v. Bank of England* (g). At all events his greater activity and diligence entitle him to have his demand discharged in the first instance: *Simpson v. Taylor* (h).

**Mr. Hamilton Smythe**, for a creditor, cited *Robinson v. Harrington* (i).

**Mr. Brewster** and **Mr. Henry Burke**, for the plaintiff, in support of the report.

The statute 3 G. 2, c. 7, s. 2, fixes the priorities of judgments in the administration of assets to be according to the time of their entry on the roll. In *Borough v. Williamson* (k) Richards, B., after elaborately reviewing the relation of judgments at Common Law and their priorities under various statutes, lays it down as settled law that judgments have priority in the administration of assets under the statute G. 2. His observations are entitled to great weight, having been made in a case of considerable difficulty and indicating his opinion and that of the Profession as to the uniform course of practice. There is a numerous class of cases on the analogous English statute 4 & 5 W. & M. c. 20, which determine the meaning of every word in it which admitted of doubt. That statute enacts that "no judgment shall have any preference unless docketed."

(a) 6 T. R. 384.

(b) 1 Bos. &amp; Pul. 307.

(c) 3 B. &amp; Adol. 655.

(d) 1 Cr. &amp; Dix, 161.

(e) 2 Wms. Saund. 9, c note.

(f) 3 Atk. 206.

(g) Cas. temp. Talbot, 217; S. C. 3 Swanst. 573; 2 Bro. P. C. 465, Toml. ed.

(h) 7 Ir. Eq. Rep. 182.

(i) Powell on Mortgages, 515.

(k) 11 Ir. Eq. Rep. 1.

The Irish statute enacts that no judgment shall have any preference except from the time it is entered. The English Act fixes a time for docketing; if docketed, the judgments have relation as at Common Law or take effect according to the Statute of Frauds; if not docketed, they are void as against purchasers, and are reduced to the rank of simple contract debts in the administration of assets; but it does not affect the priority of docketed judgments. The Irish Act does not make judgments void, but it regulates their priority in certain cases. The one Act makes judgments of no effect unless docketed; the other makes them take effect from the time of entry. In *Landon v. Ferguson* (a), an administration suit, there were judgments, bonds and simple contract debts, and it was held that judgments had no priority over simple contract debts. This case shows the meaning of the words "preference against heirs, &c., in the administration of assets." Applying the same interpretation to the same words in the Irish Act, it will follow that judgments must have priority against real assets from the time of entry upon the roll. In *Hickey v. Hayter* (b) a judgment not docketed was put on a level with a simple contract debt in an action against an administrator, Lord Kenyon saying that the point had long before been ruled as to real estate. *Steele v. Rorke* (c) decides that an outstanding judgment undocketed could not be pleaded by an administrator in an action by a simple contract creditor, thus defining the meaning of the words "preference against heirs, &c," and showing that judgments shall have priority from their entry, whether it be for the benefit of the heir or not, and that the aim of the Act is to fix a time from which judgments shall have priority, and not to confer any peculiar privilege on the heir or executor. To the same effect are *Hall v. Tapper* (d) and *Braithwaite v. Watts* (e). The case of *Doe d. McIlwaine v. Magill* (f) can only be considered as deciding that judgment creditors are not purchasers within the Statute of Frauds; it was a case of *elegit*, and the conuzor of the judgment was living. The same observation applies to *Robinson v.*

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(a) 3 Russ. 349.

(b) 6 T. R. 384.

(c) 1 Bos. & P. 307.

(d) 3 B. & Adol. 655.

(e) 2 Cr. & Jer. 318.

(f) 1 Hud. & Br. 396, n.

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Argument.

*Harrington (a), Abbott v. Stratten (b), and Smith v. Chichester (c).* None of those cases were administration suits, the conuzor of the judgment in each being alive and a defendant. The statute 3 G. 2 being remedial, ought to be construed liberally; its object is the abolition of an arbitrary presumption of law which has no foundation in reason or utility. The true principle was adopted in *Hickey v. Hayter (d)* in the construction of the English Act, which is not so worthy of being considered remedial, inasmuch as it may sometimes work injustice by reducing judgments to the rank of simple contract debts, and giving priority to specialty creditors; but the Irish Act merely abolishes the fictitious relation back of judgments to the first day of Term, and leaves them still operative as judgments of the day on which they are entered. The words of the Act are plain, and ought not to receive a forced or unnatural interpretation. The recent Registry Act, 7 & 8 Vic. c. 90, the statute 9 G. 4, c. 35, and the statute 3 G. 2, c. 7, form a single code of laws mutually illustrating each other, and should be construed together like the Landlord and Tenant Acts: *Hickson v. Collis (e)*; *Carroll v. D'Arcy (f)*. The 7th section of the Registry Act can only mean that where judgments are not postponed for want of registry they shall take effect from their entry as under the statute 3 G. 2. The Legislature has always manifested a disposition to abolish the relation of judgments, *ex. gr.* by the Statute of Frauds in the case of purchasers; by the statute of G. 2 in administration of assets; by the Sheriffs' Act as to receivers; and finally by the statute 3 & 4 Vic. c. 105 that relation is abolished in every case: *Borough v. Williamson (g)*.

The construction sought on the other side to be given to the word "preference" is too subtle. The section should be read as though the words ran thus, "shall have preference from the time they are entered." "Preference" must refer to securities *inter se*. It

(a) 1 Powell on Mortgages, 515.

(b) 3 Jo. & Lat. 603; S. C. 9 Ir. Eq. Rep. 233.

(c) 12 Ir. Eq. Rep. 519.

(d) 6 T. R. 384.

(e) 10 Ir. Eq. Rep. 447.

(f) 10 Ir. Eq. Rep. 321.

(g) 11 Ir. Eq. Rep. 1.

would be unmeaning to say that judgments shall not have preference unless there were something over which they might be preferred. Suppose the case of a recognizance and two judgments, the one prior and the other subsequent to the recognizance, and all of the same Term; the first judgment would clearly be prior to the recognizance; but, according to the argument on the other side, the second judgment would be on a par with the recognizance and also with the first judgment, *i. e.*, it would be on an equality with two securities of different priorities *quod est absurdum*. It is true that the preamble recites the danger to heirs and executors, but it affords a remedy by abolishing relation and fixing priority in a more equitable manner. The preamble of the English Act is stronger for this argument, yet it has been held to apply to all cases of creditors. For what purpose, save to effect a different object from that of the 3rd section of the English Act, have different words been deliberately introduced into the 2nd section of the Irish Act?

The argument founded upon the earlier date of the decree in *Killikelly v. Concannon* is not now maintainable, there not being any exception pointed to it.—[Counsel for the defendant admitted this.]

#### The LORD CHANCELLOR.

It is singular that at this late period such a question should for the first time formally call for the decision of the Court. I am inclined to think that Master Henn is right in his opinion. I shall however make further inquiry as to what has been the practice of Courts of Equity in this country on the subject, and I shall consider the question a little more before I dispose finally of the case.

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#### The LORD CHANCELLOR.

I have taken time to make further inquiry as to the practice of the Courts on the subject of the priorities of judgments of the same Term in administration suits. I have had the great advantage of the information which his long experience enabled Baron Pennefather kindly to communicate to me, and I found that he entirely concurs with Master Henn, who has certified that it is the uniform

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practice of the Court in administration suits to give judgments priority according to the time of their entry under the statute 3 G. 2, c. 7, s. 2. I see no reason for departing from this practice, which appears to be completely settled, particularly as the words of the Act fully warrant the construction which has been given to them. The opposite construction would require the rejection of several words, or that they should be treated as without any significance. The statute 4 & 5 W. & M. c. 20, is the analogous English Act, the 3rd section of which enacts "That no judgment not docketed shall affect lands as to purchasers or mortgagees, or have any preference against heirs, executors or administrators in the administration of assets." That Act has received a settled construction in *Hickey v. Hayter* (a) and the numerous English cases which have been cited, which is, that judgments, coming within that provision of the Act as not being docketed, shall not be considered as judgments, but shall only rank as simple contract debts. It says nothing, however, as to the priority of docketed judgments of the same Term *inter se*. But the Irish Act differs from the English Act by the introduction of words very important on this point. If it were intended that both Acts should have the same effect, why were the special words introduced? The Legislature had the English Act in view and introduced additional words, having reference to the time of the entry of the judgment, to which their natural effect ought to be given. It may be said that the same words are used with reference to executors as to heirs, although judgments have no priority *inter se* in the administration of personal estate; but that consideration is not so important as it might at first appear. Judgments never had any priority as to personal estate; they always had priority *inter se* as to real estate since the Statute of Westminster, according to the Terms of which they were entered. I do not know of any case in which this point has been considered, but in giving judgment in *Borough v. Williamson* (b) Baron Richards alludes incidentally to the statute 3 G. 2, and hints that it is a matter of course that judgments should take priority according to their entry under that Act. The uniform practice testified to by the high authority which I have already

(a) 6 T. R. 384.

(b) 11 Ir. Eq. Rep. 10, 17.

mentioned, I should not feel warranted in disturbing, more especially as it seems to me to be fully borne out by the language of the Act. The result therefore is, that Mr. Burke's judgment must have priority.

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 Judgment.

On the question, of costs, it was for the plaintiff contended that the defendants should pay the costs, they having refused to comply with the notice served on them, and having resorted to vexatious litigation : *Barrett v. Birmingham* (a).

The LORD CHANCELLOR.

I entertain no doubt on this subject. The defendants were offered every thing to which they were entitled. They refused to comply with the notice and they disputed the validity of the plaintiff's claim. I do not think it necessary to hold that the litigation was actually vexatious ; it is sufficient in such a case that they have failed in it, and I think this case falls within the general principle that the costs ought to depend on the event.

*Reg. Lib. 104, fol. 176.*

(a) 1 Ir. Eq. Rep. 417.

THE QUEEN v. MARY ELIZABETH FOOT.

(*Petty-Bag Side.*)

July 10.

**SCIRE FACIAS.**—In this case a recognizance bearing date the 16th of November 1844, entered into by James Foot as receiver in the cause of *Hodder v. Wise*, and Mary Elizabeth Foot and George Johnson as his sureties, after reciting an order of reference of the 1st of May 1844 for the appointment of a receiver in that cause, and the Master's report thereunder of the 29th of September 1844, appointing James Foot such receiver, contained the following condition, viz :—"that if the said James Foot do and shall within the space of thirteen calendar months from the 23rd day of September 1844, and from time to time thereafter within the space of

A rejoinder falsely traversing matter of inducement contained in a replication to a plea to a *scire facias* upon a receiver's recognizance, taken off the file, with costs.

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thirteen calendar months after the day of the filing of each account which he should pass, and as often as he shall be thereunto required by the said Court or by any Master thereof, account upon oath for all such rents and profits as he shall have received or without wilful default might have received out of the said lands and premises over which he has been so appointed receiver, or out of any other lands and premises over which he shall by any order of the said Court, hereafter to be made in the said cause, be appointed or extended to, and shall apply as the said Court shall order or direct all such sum or sums of money as shall at any time or times be certified by any Master of the said Court to be in his hands or properly chargeable against him as such receiver." A *scire facias* issued on this recognizance against Mary Elizabeth Foot, to which she put in a plea, whereby, after reciting the order of the 1st of May 1844, and the report thereunder and the condition of the recognizance, she pleaded performance of the same generally by James Foot the receiver. The replication, which was filed on the 12th of June 1850, alleged two breaches, the first of which, after stating "that after the acknowledgment of the said recognizance in the said writ of *scire facias* mentioned, and before the commencement of this suit, to wit on the 1st day of August in the year of our Lord 1849, to wit at Cork in the county of Cork, divers sums of money amounting in the whole to a large sum of money, to wit to the sum of £406. 3s. 7d. of the rents and profits of the said lands and premises over which the said James Foot was appointed receiver, as in the said condition of the said recognizance mentioned, were received by the said James Foot as such receiver out of the said lands and premises, and that afterwards and after the acknowledging of the said recognizance and the receiving of the said sums of money by the said James Foot as aforesaid, and before the commencement of this suit, to wit on the day and year last aforesaid, to wit at &c., in &c., the said James Foot as such receiver did account upon oath for the same, and did then and there pass and file an account in writing for all such rents and profits as he had received out of the said lands and premises up to the 1st of May 1849 aforesaid, on foot of which account William Henn, Esq., one of the Masters

of the said Court, did then and there certify that a balance amounting to the sum of £406. 3s. 7d. was then due on foot of the said account by the said James Foot," averred, "that afterwards, to wit on the 29th of October 1849, by an order of the said Court of Chancery bearing date the day and year last aforesaid, to wit at &c., in &c., it was ordered by the said Court that the said James Foot should pay Francis Wise therein named the sum of £393. 12s. being the residue of the said sum of £406. 3s. 7d. after deducting the costs therein referred to ; and also the sum of £3. 8s. 7d. for interest due thereon up to the 17th of October 1849, and all future interest to accrue due in respect thereof until paid, within ten days after service on him of the said order, and that afterwards, to wit on the 7th of November 1849, the said order was personally served on the said James Foot, to wit at &c., in &c. ; yet the said James Foot, although ten days from the said personal service of the said order have long since elapsed, did not apply the said sum of £393. 12s. or interest or any part thereof as directed by the said last mentioned order of the said Court, but hath therein wholly failed and made default, contrary to the force, form and effect of the said condition of the said recognizance."

Verification and prayer for execution.

The second breach, after stating "that after the acknowledgment of the said recognizance in the said writ of *scire facias* mentioned, and before the commencement of the suit, to wit on the 8th of February A.D. 1860, to wit at &c., in &c., divers sums of money, to wit the further sum of £470. 15s. 1d. of the rents and profits of the said lands and premises over which the said James Foot was appointed receiver, as in the said condition of the said recognizance mentioned, were received by the said James Foot as such receiver out of the said lands and premises, and that afterwards and after the acknowledging of the said recognizance and the recovery of the said last mentioned sums of money by the said James Foot, and before the commencement of this suit, to wit on the day and year last aforesaid, the said James Foot was required by the said Court of Chancery within three weeks after service on him of the said order then and there made, to lodge his first account in the said cause and to pass the same without delay ;" averred, "that after-

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wards, to wit on the 17th of April 1850, the said last mentioned order was duly served upon the said James Foot, to wit at &c., in &c., and although more than three weeks from the service of the said last mentioned order elapsed previous to the issuing of the said writ of *scire facias*, to wit the space of one calendar month, yet the said James Foot did not lodge his final account in the said cause, nor did he proceed to pass the same or otherwise account upon oath in compliance with the terms of the said last mentioned order for the said last mentioned sums of money received by him as such receiver out of the said lands and premises, but hath therein wholly failed and made default, contrary to the force, form and effect of the said condition of the said recognizance."

Verification and prayer for execution.

On the 18th of June 1850 the defendant filed a rejoinder as follows:—*Executio non*, “Because she saith that the said James Foot did not after the acknowledgment of the said recognizance in the said writ of *scire facias* mentioned, and before the commencement of this suit receive any sums or sum of money of the rents and profits of the said lands and premises over which the said James Foot was appointed receiver as in the said condition of the said recognizance mentioned, in manner and form as the said Attorney-General hath above in his said replication in that behalf alleged; and of this the said defendant puts herself upon the country and soforth.

On the 3rd of July the defendant served notice of motion on the Petty-bag side of this Court to set aside this rejoinder, on the ground of its being a sham and frivolous pleading filed for the purpose of delay, and of embarrassing the plaintiff and obliging him to demur to the same, and thereby gaining time and delaying the plaintiff in his execution in this cause; and also that judgment might be forthwith marked for the plaintiff as and for want of a rejoinder.

**Mr. Brewster and Mr. Jenkins**, in support of the motion.

Argument.

The rejoinder traverses matter of inducement, altogether passing by the breaches of the condition of the recognizance as averred by the replication, namely the non-application by the receiver of the

certified balance as in the manner in which he was directed by the order of the 29th of October 1849 to apply it, and the neglect to pass his final account as directed by the order of the 8th of February 1850. The rejoinder acknowledges that James Foot was duly appointed receiver, but denies that he received any rent; that denial being contrary to the oath of James Foot, taken by him on passing his account on the 1st of August 1849, and to the certificate of the Master finding that on foot of that account James Foot had £406. 3s. 7d. in his hands. The clear object of the rejoinder is to embarrass the plaintiff and to provoke a demurrer.

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*Mr. Bastable*, in support of the rejoinder.

The rejoinder traverses a fact in the replication; it is no sufficient ground for setting it aside, because it traverses an immaterial averment, even assuming that to be the case; nor because it is open to a demurrer; the Court will not interfere in a summary way, but will leave the party to demur: *Horner v. Keppel* (*a*); *Sims v. Horner* (*b*); *Stoney v. Firman* (*c*); *Anonymous* (*d*); *Barrett v. Daly* (*e*); *Clarke v. Clarke* (*f*); *Edwards v. Greenwood* (*g*); *Papineau v. King* (*h*).

*Mr. Jenkins*, in reply.

There is a manifest distinction between setting aside a demurrer on motion, and setting aside a plea unsustainable either in law or proof, as this is; this rejoinder transgresses the cardinal rules of pleading; it traverses matter of inducement, the receipt of rents by the receiver as alleged in the plea being only introductory matter to the non-application of the certified balance according to the order of the Court; it traverses immaterial matter, because although the receiver might not have received any rent, yet he is bound to account according to the order of the Court; it is a departure from

(*a*) 10 Ad. & El. 18; S. C. 2 Per. & Dav. 234.

(*b*) 3 Ir. Law Rep. 415.

(*c*) 6 Law Rec. N. S. 304, n.

(*d*) 6 Law Rec. N. S. 303.

(*e*) 8 Ir. Law Rep. 518.

(*f*) Hay. & Jo. 347.

(*g*) 5 Bing. N. C. 476.

(*h*) 2 Dowl. N. S. 226.

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the plea of performance, and is contrary to the rule that all pleadings ought to be true ; *Stephens on Pleading*, p. 243. In *Balmano v. Thompson* (*a*), Tindal, C. J., says :—“It is perfectly clear that the Court have power and authority to interfere in a summary way, where they cannot but see that the plea is intended to perplex and confound instead of entering upon a real defence ; and although they will not interfere where there is a reasonable doubt, where the sufficiency or insufficiency of a plea is a measuring cast, the Court is bound to do so where the plea is manifestly informal, and intended to harass and delay the plaintiff.” And so in *Horner v. Keppel* (*b*), Lord Denman, C. J. says :—“Where a plea is clearly frivolous on the face of it, that is a good ground for setting it aside ;” and as in *Knowles v. Burward* (*c*), where the matter set forth being clearly no defence, the plea was waste paper ; so where the issue tendered is irrelevant, as in *Wilson v. Lynch* (*d*), or where, as in *Mitford v. Finden* (*e*), the plea was set aside on the ground of its being false, tricky and calculated to embarrass the plaintiffs ; and Sir Edward Sugden, in the *Queen v. Beatty* (*f*), ordered a rejoinder to a replication to a plea in *scire facias* to be taken off the file as frivolous and filed for delay, observing in pronouncing his judgment that it was in fact a sham plea, a mere abuse of pleading and a quibble to gain time.

Judgment.

## The LORD CHANCELLOR.

I never saw a more untenable pleading than the rejoinder in the present case. I refrain from expressing myself more strongly. The recognizance was to account whenever thereunto required and to pay the certified balances. An account was passed and a balance ascertained, and it is now admitted that this balance was not paid. By an order of the 8th of February 1850 the receiver was directed to pass a final account; this he has not done ; and even assuming that he had not received any rents for which he was answerable upon passing his final account, he should nevertheless account as

(*a*) 8 Scott, 310.(*b*) 10 Ad. & El. 18.(*c*) 10 Ad. & El. 19.(*d*) 1 Hud. & Br. 336.(*e*) 8 M. & W. 511.(*f*) 8 Ir. Eq. Rep. 132.

directed by the order. This rejoinder is false in fact and bad in law, and was clearly only put in for the purpose of embarrassing the plaintiff, and to induce a demurrer and thereby to gain time; and I have no doubt at all as to the jurisdiction of the Court at any time in setting aside such a pleading; and accordingly let the rejoinder be set aside and judgment be forthwith entered up for the plaintiff, with costs, including the costs of the motion.

Motion granted with costs.

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Judgment.

### L'ESTRANGE v. WHITE.

### L'ESTRANGE v. MOORE.

Nov. 8.

THE bill in *L'Estrange v. Moore*, filed in 1815, stated that in the month of January 1810 Joseph Moore, in consideration of £2,100, granted by deed to Anthony L'Estrange for his life an annuity of £300, and charged the same upon the lands of Tully and Early-Castron in the King's County. That bill was filed by Anthony L'Estrange, the annuitant, against Susanna and Elizabeth Moore, sisters of Joseph Moore the grantor, who were then in possession of the lands under writs of *elegit* issued upon judgments obtained by them upon bonds executed to them by their brother the grantor. It prayed, *inter alia*, that those bonds and judgments should be declared null and void as against the plaintiff, on the ground that

Under a decree pronounced in 1817 in a suit by the grantee of an annuity, charged upon lands, against judgment creditors of the grantor, who were in possession by virtue of writs of *elegit*, an account was taken of what was due to the grantee, and a receiver was appointed over the lands.

The grantor of the annuity was not a party to that suit, and died in 1842 without having impeached the accuracy of the account taken in 1817. The grantee having also died, his executor in 1848 (up to which time the receiver had continued in possession) filed a bill against the co-heiresses of the grantor, praying a revivor of the former suit, an account of what was due for arrears of the annuity, and that the sum found due should be declared a charge upon the lands. The defendants insisted that the account taken in the former suit in the absence of the grantor was not binding upon them. Held, that in consequence of the acquiescence of the grantor during a period of twenty-five years, and the subsequent acquiescence of the defendants for six years, they were not entitled to have the account of what was due in 1817 taken *de novo*, but that they should be at liberty to surcharge and falsify it.

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Statement.

there was not any valuable consideration given for them. It also prayed a receiver and an account of what was due to the plaintiff on foot of the annuity. *Joseph Moore was not a party to that suit.* A decree was pronounced in it in the year 1817, directing an account, and that a receiver should be appointed by the Master. Shortly afterwards a receiver was appointed and an account taken, by which a sum of £583 was reported due to the plaintiff as arrears of the annuity. The receiver continued in possession up to the present time. Joseph Moore having died in 1842, the bill in *L'Estrange v. White* was filed on the 25th of May 1848 by Francis L'Estrange (the executor of Thomas the annuitant, who was also dead), against Elizabeth White and Maria Leggatt, as co-heiresses of Joseph Moore, praying a revivor, and an account of what was due as arrears of the annuity to the plaintiff as executor; and that the sum found due should stand charged upon the lands, and that the receiver should be continued.

The defendant Maria Leggatt, by her answer, insisted that the accounts taken in *L'Estrange v. Moore* having been so taken in the absence of Joseph Moore, were not binding upon her and her co-defendant Elizabeth White.

Argument.

The *Solicitor-General*, Mr. F. Fitzgerald and Mr. Ince, for the plaintiffs, offered the accounts in the original cause of *L'Estrange v. Moore* in evidence.

Mr. Battersby, with Mr. Osborne, for the defendant Maria Leggatt, objected, and cited *Latouche v. Dunsany* (a); *Wrixon v. Vize* (b); *O'Brien v. Mahon* (c).

Mr. J. S. Armstrong and Mr. Sherlock, for other parties.

#### The LORD CHANCELLOR.

Judgment.

The defendant Maria Leggatt does not suggest that there was any fraud in taking the former accounts; if the possession had been

(a) 1 Sch. & Lef. 137.

(b) 2 Dr. & War. 192; S. C. 4 Ir. Eq. Rep. 463.

(c) 2 Dr. & War. 306.

in a private individual, perhaps you might be entitled to insist upon opening the accounts; but this was a possession under the Court. It is quite plain that Mr. Moore for more than twenty years knew what was going on, and several years have elapsed since his death without any step having been taken or objection made on the part of the defendants. The acquiescence has been too great to admit of a decree permitting the defendants to have the accounts taken over again. The defendants shall have liberty to surcharge and falsify those accounts if they can.

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*Chancery.*  
 L'ESTRANGE  
 v.  
 WHITE.  
 Judgment.

1 *Reg. Lib. Gen., fol. 10.*

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### KIRK *v.* EDMONSTONE.

*Nov. 9, 16.*

THE prayer of the petition in this matter was, that the sum of £250 charged upon the lands of Dunbrought in the county of Antrim by will of James Edmonstone, together with the interest due thereon from the 17th day of April 1850, might be decreed a valid charge on those lands, and that the petitioner might be declared entitled to the sum due, with interest, and that an account might be taken of what was so due, and that the respondents, or such of them as ought so to do, might be decreed to pay the petitioner what should be so found due, together with the costs, or in default thereof, that the lands of Dunbrought or a competent part thereof might be sold to pay the sum found due to the petitioner, and that all proper parties might join in such sale, and all necessary directions might be given and accounts taken, &c., and that in the meantime a receiver might be appointed.

On a petition under the Court of Chancery Regulation Act for an account on foot of a legacy charged upon lands, and for payment of the sum found due and for a sale of the lands if necessary, and that all necessary accounts should be taken and a receiver appointed, the Court refused to make a summary order under the 15th section of the Act, being of opinion that although the case fell within the spirit, it was not within the letter of that section.

Mr. Faloon, for the petitioner.

The sole question is, whether or not the Court will consider this a case within the summary jurisdiction of the 15th section of the vol 1.

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*v.*  
 EDMON-  
 STONE.

Court of Chancery Regulation Act; for though, strictly speaking, it is not a petition for the administration of the real *and personal* estate of a testator, yet it certainly is within the spirit of that section. We therefore have not served any notice on the respondents.

**The LORD CHANCELLOR.**

*Judgment.* It is within the spirit of the section, but I shall not travel out of the strict letter of the Act, and in all cases where I may have a doubt as to whether or not a case comes within the section, I shall require notice to be served on whatever parties the petitioner may be advised. I shall give leave to serve notice in this case, and the matter may be mentioned on the next petition day.

*Nov. 16.* Mr. Faloon mentioned to the Court that the tenant for life and tenant in tail were both out of the jurisdiction.

**The LORD CHANCELLOR.**

Then there must be a special application to substitute service.



**INGRAM v. RUSSELL.**

*Dec. 14.*

Where the co-nuzor of a judgment is alive, the Court will not pronounce a summary order under the Court of Chancery Regulation Act upon a petition praying an account on foot of the judgment, and a sale of his real estate.

Mr. MFARLAND applied for a summary order of reference under the 15th and 27th sections of the Court of Chancery Regulation Act. The petitioner had obtained judgments against the respondents in Trinity Term 1834 on their joint and several bond. The judgments were registered in December 1847 and revived in Michaelmas 1849. The petitioner was also a salvage creditor, in respect of an advance made by her to prevent the eviction for non-payment of rent of a part of the lands affected by the judgments. One of the respondents had gone to America in embarrassed circumstances, the other had been served with notice of this application. The petition

prayed the usual account of the sums due, of the lands of the respondents, a sale and payment, out of the proceeds, of the demands of all persons entitled.

1850.  
*Chancery.*  
INGRAM  
v.  
RUSSELL.  

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*Judgment.*

**The LORD CHANCELLOR.**

This case does not fall within the terms of the 15th section; there is not any deceased person. You only seek to affect the real estate; more you could not, inasmuch as the conuzors are alive.

Mr. *McFarland* submitted that the case was within the 27th section, which should be read in conjunction with the 15th.

**The LORD CHANCELLOR.**

The cause must be set down and heard in the usual manner.

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**JOHNSTONE v. LINDE.**

*Nov. 9.*

In this case the LORD CHANCELLOR observed that the petition was of great length, unnecessarily setting out deeds which might have been much more concisely stated; and that in all such cases he should direct the Taxing-master to have regard to the matter improperly introduced into petitions. His Lordship added, that prolixity was one of the evils which the Court of Chancery Regulation Act was intended to remedy.

Where petitions under the Court of Chancery Regulation Act are unnecessarily prolix, the Court will direct the Master to have regard, in the taxation of costs, to the matter improperly introduced.

1860.

Chancery.

## RYAN v. MULLIGAN.

*Nov. 9, 16.*

The Court will not make a summary order of reference upon a petition under the Court of Chancery Regulation Act, to which interrogatories are annexed.

This was a petition under the Court of Chancery Regulation Act, praying for the appointment of a new trustee under a will and the removal of Dr. Mulligan from that office. There were several interrogatories attached to the petition.

*Mr. M. Barry* asked for a summary order of reference under the 15th section of the Act.

## The LORD CHANCELLOR.

You must serve notice on Dr. Mulligan for the next petition day.

*Nov. 16.**Argument.*

*Mr. Hamilton Smythe* on this day, for Dr. Mulligan the present trustee, objected that there were interrogatories annexed to the petition without leave of the Court, and asked for costs, inasmuch as the petition impeached his client's character.

## The LORD CHANCELLOR.

*Judgment.*

I do not see the necessity of those interrogatories. Interrogatories should not be filed in any case except where the petitioner cannot obtain *aliunde* the information which he requires. I shall not in any instance pronounce a summary order of reference under the 15th section where interrogatories are annexed to the petition. The interrogatories to this petition must be expunged, and then I shall make the order. The Master has full jurisdiction with regard to costs in this case.\*

\* Sed vide *Cuning v. Taylor*, infra p. 25, as to costs incurred before the Court.

1850.  
*Chancery.*

## TRIPHOOK v. GRIFFIN.

Nov. 9.

MR. ISIDORE BLAKE moved for a summary order of reference under the Court of Chancery Regulation Act, upon a petition for the administration of assets.

To induce the Court to pronounce a summary order of reference under the Court of Chancery Regulation Act for the administration of assets, there should be an affidavit that there is not any other proceeding pending for the same purpose.

## The LORD CHANCELLOR.

I think it necessary to require an affidavit in these administration cases that there is not any other proceeding pending for the same purpose. On such an affidavit being produced to the Registrar, I shall make the order.

NOTE.—His Lordship has made the same observation in many other similar cases.

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Ex parte CHARLES JAMES GRIFFITH and  
ARTHUR D. MAGEE.

Nov. 11.

MR. W. H. GRIFFITH moved that the solicitor of the petitioner should be at liberty to verify by affidavit the petition in this case (which was under the Court of Chancery Regulation Act), instead of the petitioner.

A petition under the Court of Chancery Regulation Act may be verified by the solicitor of the petitioner, but not in the short form given by the Act. The solicitor's affidavit should concisely verify the details of the petition.

## The LORD CHANCELLOR.

The words of the 5th section are—"That every petition to be presented under this Act *may be* verified by affidavit annexed thereto, &c., in the form or to the effect set out in the schedule annexed to this Act." That form is for the petitioner only; but

1850.

*Chancery.*  
*Ex parte*  
 GRIFFITH.

I do not understand the section as excluding other modes of verification. I think that what you ask may be done, but not in the short form given by the Act. The solicitor's affidavit must verify the various details of the petition, as concisely however as possible, and without setting forth deeds or records at length.\*

Nov. 9.

## \* BURNETT v. COOPER.

Where a petition under the Court of Chancery Regulation Act has been verified by the solicitor and not by the petitioner in the form given by the Act, the Court will not make a summary order under the 15th section; notice must be served of the petition, and it must be set down for hearing as a cause petition.

In this case, which was a petition under the same Act, and verified by permission of the Court by the solicitor, the LORD CHANCELLOR required that, inasmuch as the petition had not been verified in the manner pointed out by the Act, notice should be served upon such persons as the petitioner might be advised.

## STACKPOOLE v. STOTT.

MR. J. F. REILLY moved for a summary order under the 15th section of the Court of Chancery Regulation Act upon a petition under that Act, verified by the solicitor of the petitioner. The petitioner resided in the Isle of Man, in which there is not any Master Extraordinary of this Court.

## The LORD CHANCELLOR.

The petition is not verified in the ordinary short form given by the statute. The 15th section gives power to make an order in a summary way "on the production of such affidavit of verification as aforesaid;" that is, the affidavit alluded to in the 5th section, and set out in the schedule annexed to the Act, which affidavit is adapted for petitioners only. I have no difficulty in saying that your petition is sufficiently well verified to enable you to proceed upon it under the Act; but I doubt that I can make a summary order upon a petition not verified in the precise manner pointed out by the Act. You can go on no doubt by giving notice, which must be served in the ordinary way, and the petition must be set down for hearing as a cause petition. You may apply for leave to set it down so as to be heard at the present Sittings.

Nov. 30.

1850.  
Chancery.

### WOODROOFFE v. FANNIN.

*Nov. 30.*

**MR. HEMPHILL** moved for a summary order of reference to the Master, under the 15th section of the Court of Chancery Regulation Act, upon a petition presented under that Act on foot of a judgment, in respect of which the judgment creditor had registered under statute 13 & 14 *Vic.* c. 19, s. 6, an affidavit of ownership of certain lands by the debtor, to which registration the 7th section of the latter Act gives the effect of a mortgage. The petition prayed an account, foreclosure, sale and receiver.

A judgment creditor who has registered an affidavit of ownership of lands by the debtor, pursuant to statute 13 & 14 *Vic.* c. 29, which gives to such registration the effect of a mortgage, is entitled to proceed summarily under the 15th section of the Court of Chancery Regulation Act.

#### The LORD CHANCELLOR.

You are entitled to an order of reference to the Master, such as you seek.

**Mr. Brewster (*amicus Curiae*)** observed, that although the judgment debt might be paid and the judgment satisfied, yet the legal estate in the lands would still remain in the creditor under the 7th section of the 13 & 14 *Vic.* c. 29.

#### The LORD CHANCELLOR.

Perhaps that is so; but the judgment creditor who under those circumstances refused to execute a conveyance would have to pay the costs of a suit for compelling him to do so. I do not think that in this respect the effect of that enactment is very alarming.

*Judgment.*

1850.

Chancery.

## MURPHY v. KELLER.

Nov. 30.

On a petition UPON this petition, under the Court of Chancery Regulation Act, under the Court of Chancery Regulation Act for a partnership account, it appearing that an arbitration had taken place upon the subject in dispute and that an award was made, although not under seal; *Held*, that the case was not one for a summary order under the 15th section of the Act, and that notice must be served upon the respondent.

*Mr. Thomas Jones* now moved for a summary order under the 15th section of the Act.—[The LORD CHANCELLOR. There appears to have been an arbitration.]—The award is void, not having been under seal: *Everard v. Paterson* (a), and 2 Wms. Saund. p. 62.

## The LORD CHANCELLOR.

*Judgment.*

Such a proceeding having taken place as an arbitration between the partners prevents this from being a proper case for the exercise of the summary jurisdiction under the 15th section. You must give notice of the petition to the respondent. I shall not make orders *ex parte* except in clear and simple cases.

(a) 2 Marsh. 304.

1850.  
Chancery.

## CUMING v. TAYLOR.

Dec. 7, 14.

**JOHN TAYLOR**, by his will made in August 1832, amongst other bequests to various persons, gave £100 to his grandson, John Cuming the petitioner, when he should attain twenty-one years; and to testator's son, Alexander Taylor, he devised certain lands in the town of Belfast, and appointed John Smith Taylor and Alexander Taylor his executors, who on the death of the testator proved his will.

Alexander Taylor, by his will of the 20th of January 1834, after directing his freehold and chattel property to be sold, and bequeath-ing certain legacies thereout to various persons, ordered the residue to be divided equally between the petitioner and certain other persons. In this will also, John Smith Taylor and two other persons were appointed executors. John Smith Taylor alone proved the will.

By letter of 27th April 1850, John Smith Taylor undertook to pay the legacy of £100 to the petitioner, and also to account for the estate and effects of Alexander Taylor, and to pay the balance due to the petitioner on foot of the residuary bequest on or before the 1st of November 1850.

Neither payment having been made, the petition was presented under the Court of Chancery Regulation Act, praying payment of the £100 legacy under the will of John Taylor; and that the trusts of the will of Alexander Taylor should be carried into execution, an account of his personal estate and debts and legacies; that the assets should be applied in due course of administration, and an account of his real estate and the rents and profits, and also of the charges and incumbrances thereon, and that if necessary it should be sold and the proceeds applied according to the trusts of the will, and his part of the residue paid to the petitioner, and that a receiver should be appointed.

Where a bill would not be sustainable, a petition under the Court of Chancery Regulation Act cannot be supported. Therefore such a petition is open to an objection for multifariousness, should it exist.

Upon a petition, plainly open to such an objection, the Court will not pronounce a summary order of reference without notice.

Costs of proceedings before the Court in such a petition are within the jurisdiction of the Court only and not of the Master. On petitions for the administration of assets the Court in making an order of reference to the Master will include a direction that the petitioner's costs already incurred shall be payable to him in the same order as his demand (if any), and out of the same fund or by the same party.

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Chancery.  
CUMING  
v.

TAYLOR.  
Judgment.

Mr. *B. Stephens* now moved for a summary order of reference under the 15th section of the Act.

The LORD CHANCELLOR.

The petition seems to me to be open to objection on the ground of multifariousness. I shall not make on such a petition an *ex parte* order, which might probably be set aside next day on application by the respondent. You must give him notice of this petition. Perhaps he may consent to have both matters included in the same petition.

Dec. 14.

Mr. *B. Stephens* again moved for an order upon the petition under the 15th section. There was not any appearance for the executor, on whom notice had been served in Belfast upon the 12th of December.

The LORD CHANCELLOR.

I can scarcely consider that a sufficiently long notice has been given. I shall, however, make an order of reference on the petition, reserving permission to the respondent to object to it on the ground of multifariousness.

Mr. *B. Stephens* suggested that the order should reserve leave to the respondent to object generally, and that it should not specially draw his attention to the objection on the ground of multifariousness.

The LORD CHANCELLOR.

I cannot adopt that suggestion. If the case made be such that a bill would not be sustainable, you cannot support a petition.

Mr. *B. Stephens* asked that the order should reserve liberty for the petitioner to apply to the Court for the costs. Under the 25th section of the Act the Master has power only to award costs incurred in respect of proceedings in his office. The costs of proceedings before the Court are in the discretion of the Court only.

## The LORD CHANCELLOR.

It would lead to great expense to bring the parties back again to the Court. It will be better at once to make an order with respect to costs already incurred. Let the costs of this petition up to the present time be costs in the matter payable to the petitioner in the same order as his demand, if he succeed in establishing any, and out of the same fund, or by the same party.

Subsequently in the day in another and similar petition matter the LORD CHANCELLOR said that the Registrar should make the above order as to costs the general direction in all such cases.

*1 Reg. Lib. Gen., fol. 151.*

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*Chancery,*  
 CUMING  
 v.  
 TAYLOR.  
 —  
*Judgment.*

## MULLOY v. GOFF.

Nov. 12, 13.

GEORGE EARL OF KINGSTON, being seised in fee of the lands of Oakport and certain other lands in the county of Roscommon, by indenture of the 28th of May 1798, demised them and "all the timber then growing" thereon to William Mulloy, to hold to him, his heirs and assigns from the 1st of May then last past, for three lives. This indenture contained the usual covenant for perpetual renewal. On the 10th of April 1811 the Earl of Kingston conveyed his reversion in fee in the premises to Robert Goff who by his will devised them to his eldest son Thomas Goff, in fee, and subsequently died without revoking or altering his will. Thomas Goff, by will dated the 5th of July 1841, devised them in fee to trustees in trust

Upon a lease for lives with covenant for perpetual renewal, more than one year's rent being due, and the landlord being a minor and ward of this Court, the Master directed an ejectment for non-payment of rent to be brought against the plaintiff (the tenant), and certain mort-

gagees of his interest, upon which ejectment judgment was by consent obtained, and an *habere* executed on the 28th of May 1847. The lessors of the plaintiff in ejectment on the same day demised the lands to A. B. (a relative of the plaintiff and creditor as against his estate) for six months pending redemption, during which time the plaintiff was in fact allowed to occupy the lands. The mortgagee being entitled to three months' further time to redeem, the forfeiture could not have become complete until the 28th of February 1848, during which period the last *cestui que vie* named in the lease died. Upon the 28th of February 1848 at the instance of the mortgagees the Master made an order directing that certain bills payable three months

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for the defendant Thomas William Goff then a minor, and appointed as the guardian of his person and estate the Reverend William Caulfield one of the trustees. Thomas Goff died on the 24th of October 1844, leaving the defendant his eldest son and heir-at-law, and several other children him surviving, all being then minors. Pursuant to an order in this Court on the 9th of November 1844 in the then pending matter of *Goff's minors*, the Master reported that the Reverend William Caulfield was a proper person to be guardian of the minor's estate, and Peter M'Keogh to be receiver. On the 23rd of April 1845 that report was confirmed. William Mulloy, being in embarrassed circumstances, during the latter years of his life permitted the rent to fall into arrear. He died in May 1846, leaving the plaintiff Coote Mulloy his eldest son and heir-at-law, who as such became entitled to the interest under the lease of 1798, and entered into possession of the premises.

On the 25th of January 1834 William Mulloy had mortgaged his estate in the premises and certain other lands to William St. Clair for £7,646. 3s. 3d. The mortgagee's interest in the premises became ultimately vested in Mary Cockburne and her three infant children, who had commenced a foreclosure suit against the present plaintiff, and obtained a receiver over the latter lands.

after date, drawn by the plaintiff and accepted by A B, should be received "on the part of the minors as payment of the rent for which *habere* executed and a further half year; if bills not paid, the forfeiture to be complete."

The solicitor for the minor and his testamentary guardian objected to this order at the time of its being made, but took the bills, and on their arrival at maturity and non-payment caused them to be protested. The minor, who was near the attainment of his full age, immediately upon hearing of the order expressed his approbation of it. The plaintiff continued in undisturbed possession during the currency of the bills, and on their non-payment refused to deliver up possession of the lands. An ejectment on the title was brought in the Common Pleas, on part of the landlord, by direction of the Master, against the plaintiff and the mortgagees, to which the plaintiff alone took defence, but a verdict was obtained against him; he then moved that the verdict should be set aside, but failed in this also and judgment was recovered against him. He then filed his bill in this Court offering to lodge in Court the rent and costs, and praying a renewal, redemption and an injunction to restrain the landlord from enforcing the judgment in ejectment. The mortgagees were not parties to this equity suit. *Held*, that the arrangement made on the 28th of February 1848 was binding, and that, if the bills had been paid when due, the plaintiff would have been entitled to relief; but—

*Held also*, that, in consequence of the bills not having been so paid, the Court had no power to decree redemption, and that the plaintiff's bill must be dismissed with costs.

Permissive waste of a mansion, on the part of the tenant, is not a sufficient ground for refusing a renewal.

Rent, which accrued partly during the lifetime of William Mulloy, and partly after his death, being in arrear, Master Litton on the 17th of December 1846 made an order in the matter of *Goffe minors* directing that an ejectment for non-payment of rent should be brought in the names of the trustees of the will of Thomas Goff. Upon that ejectment (a copy of which was served as well upon the mortgagees Cockburne, as upon the defendant Coote Mulloy and other persons), the lessors of the plaintiff obtained by consent judgment as of Hilary Term (March 29) 1847.

An *habeere* issued upon that judgment, and the Sheriff delivered possession on the 28th of May 1849; upon the same day the premises were by indenture demised by the lessors of the plaintiff to Mr. George French (a near relative of the defendant, and who had proved a demand as a specialty creditor of William Mulloy in the cause of *Cockburne v. Mulloy*), for the term of six months pending redemption. Those six months (during which the defendant Coote Mulloy in fact occupied the lands) expired upon the 28th of November 1847 without any redemption by the plaintiff Coote Mulloy; but as the mortgagees Cockburne had a further period of three months within which they might redeem, the forfeiture would not have become absolute until the 28th of February 1848.

On the 17th of February 1848, the Master of the Rolls made an order in *Cockburne v. Mulloy* extending the receiver in that cause over the premises in question, and giving him liberty to borrow money for the purpose of redeeming the lands, and to apply the rents of those and the other mortgaged premises to that purpose.

On the 23rd of February 1848, Frances Mulloy, the last remaining *cestui que vie* in the lease of 1798, died.

On the 26th of February 1848, application was made on behalf of the mortgagees to the Master, in the matter of *Goffe minors*, to enlarge the time for redemption of the lands; the solicitor for the defendant and his guardian then attended. It was proposed on the part of the mortgagees that a bill of exchange, drawn by the plaintiff Coote Mulloy upon and accepted by Mr. George French for £1565. 10s. 8d., being the amount of arrear of rent then due, and of a further gale up to the 1st of May 1847, and another bill drawn

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and accepted by the same persons for £100 to cover the costs incurred in the ejectment and other proceedings relating thereto, should be received as security for payment of the rent and costs within three months from that time. The Master expressed his approbation of the arrangement, and adjourned the proceedings until the 28th of February (being the last day of the period of nine months within which the mortgagees might redeem), for the purpose of procuring the acceptances from Mr. French, who was then absent.

On the 28th of February the application was renewed on behalf of the mortgagees. The solicitor for the defendant and his guardian objected to be a consenting party to the proposed arrangement, and produced to the Master a note of the opinion of Counsel advising the solicitor of defendant that the Master had not jurisdiction to extend the time for redemption or to accept the bills as security for payment of the rent and costs; but the Master, being of the contrary opinion, made the following order:—

“ 1848, February 28th: *Goff's minors.* Attendance for minors and guardians and receiver, and plaintiffs Cockburne, and receiver in *Cockburne v. Molloy*, and receiver in *Goff's minors.* Mr. George French, a creditor and trustee, under order of the 17th February 1848 in *Cockburne v. Mulloy*, having accepted a bill for £1565. 10s. 8d. at three months after date, and all parties admitting that the bill is good, receive it on part of the minors as payment of the rent, for which *habere* executed and a further half year; *if bills not paid, forfeiture to be complete;* and the bill for £100 having been also accepted by him, let this bill lie in the hands of Babington to pay the costs of ejectment proceedings and this meeting and the meeting of Saturday; and all parties agreeing that the estate had been saved by these acceptances, declare Mr. French entitled to all the rights which can be conferred on him by the order aforesaid, or as salvage creditor otherwise, and let a report be prepared at minors' expense.”

Those bills, which were drawn and indorsed by the plaintiff and accepted by Mr. George French, were handed to Mr. Babington, the solicitor for the defendant, who retained them accordingly. The plaintiff remained in undisturbed possession of the lands during the

currency of the bills which, upon arriving at maturity, were not paid and were duly protested. The defendant having refused to deliver up possession of the lands, the Master directed an ejectment on the title to be brought. In Michaelmas 1848 that ejectment was brought in the Court of Common Pleas, and served upon the plaintiff, the mortgagees and several other persons. The present plaintiff, Coote Mulloy, only took defence. Upon the trial at the Roscommon Spring Assizes 1849 his Counsel called on the Judge to direct a verdict in his favour, on the ground that the forfeiture was waived by acceptance of the bills, which the learned Judge refused to do, but saved the point for the Court above, and left as a question for the jury, whether 'the bills were taken subject to the condition, and whether they were unpaid? and if so, he told them to find for the plaintiff in the ejectment, otherwise for the defendant (the present plaintiff). Counsel also called for a nonsuit as no demand of possession was proved; but this request was also refused. The jury found a verdict\* for the plaintiff in the ejectment.

Upon the 16th of March 1849 a sum more than sufficient to cover the amount of the rent and costs was tendered on behalf of the plaintiff to the solicitor for the defendant and his guardian, but was refused. Subsequently, in Easter Term 1849, the Court of Common Pleas refused to disturb the verdict. The case will be found reported as *Lessee Goff v. Mulloy (a)*.

Upon the 26th of April 1849 the plaintiff filed his bill in the present suit, praying that the defendant should be decreed to execute a renewal to the plaintiff pursuant to the covenant in the lease of 1798 and that, if necessary, plaintiff should be decreed entitled to redemption of the premises comprised in that lease on payment of all rent and costs, and that, notwithstanding the ejectment and *habere*, the lease should be declared a subsisting interest, and that the defendant should be restrained from taking out execution on foot of the judgment in ejectment.

(a) 12 Ir. Law Rep. 95.

\* While the jury were deliberating upon their verdict an offer of the amount of the rent and costs was refused by the attorney for the lessors of the plaintiff.

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The defendant, in the name of his guardian, had, by leave of the Master, filed a bill, on the 12th of June 1848, against Coote Mulloy the plaintiff and Mr. George French, alleging that Mulloy had, during the currency of the bills, been committing waste both on the house and lands of Oakport, and praying for an injunction and account of waste. Upon the 13th of June 1848 the common injunction, until answer, was granted. The defendant in the present suit, amongst the other grounds which appear in argument, relied upon the waste as disentitling the plaintiff to the relief sought by his bill. The evidence as to ownership of the trees and as to the nature and extent of the waste was of a conflicting character. There was also evidence given which showed that the mansion upon the lands had fallen into a state of disrepair.

Mr. Serjeant *O'Brien*, Mr. *Carleton* and Mr. *J. M'Mahon*, for the plaintiff.

Argument.

A litigious defence by the plaintiff to the ejectment, waste, and forfeiture by non-redemption within the time prescribed by the statutes, have been relied on by the defendant as disentitling the plaintiff to the relief prayed. But a litigious resistance on the part of the tenant is no answer to a bill for redemption: *Newenham v. Mahon* (*a*) ; *Fitzgerald v. Hussey* (*b*) ; *Wallace v. Patten* (*c*) : nor that he has committed breaches of covenant: *Swanton v. Biggs* (*d*). Nor are mere delay and non-payment of rent sufficient grounds for refusing a renewal: *M'Donnell v. Burnett* (*e*) ; *Trant v. Dwyer* (*f*) ; *Kent v. Roberts* (*g*) ; *Fitzgerald v. O'Connell* (*h*) : nor waste: *Flood v. George* (*i*) ; *Kennan v. White* (*k*). There was not here any continued resistance of payment of rent, and the evidence for the plaintiff shows that the trees cut down were his property, and that nothing which can fairly be called waste has taken place.

As to the alleged forfeiture. The objection as to non-payment

(*a*) 3 Ir. Eq. Rep. 304.

(*b*) 3 Ir. Eq. Rep. 319.

(*c*) 1 Ir. Eq. Rep. 338.

(*d*) Beatty, 170.

(*e*) 4 Ir. Eq. Rep. 216.

(*f*) 2 Bl. N. S. 11.

(*g*) 3 Ir. Eq. Rep. 279.

(*h*) 6 Ir. Eq. Rep. 455.

(*i*) Lyne on Renewals, Appx. cx.

(*k*) Ibid. cxix.

within the time limited for redemption may be waived: *Devereux v. Bradstreet* (*a*) ; *Butler v. Burke* (*b*). In neither of these cases was there any compliance with the statute; but there was the assent of the landlord, which, whether express or constructive, keeps alive the right to redeem. The taking of the bills was a waiver of the forfeiture and an assent of the landlord to the right to redeem. It is said that the solicitor of the defendant and his guardian dissented from the arrangement of the 28th of February 1848; but whatever his words may have been, he acted in the spirit of that arrangement and took possession of and kept the bills, which were subsequently protested by him, and he gave notice of their dishonour. Moreover, during the life of the bills the plaintiff was left in undisturbed possession of the lands. Where compensation can be given to the party entitled to take advantage of a forfeiture or penalty arising from the non-payment of a sum of money, this Court will grant relief, and such relief is not limited to cases of accident, but will be given even against negligence and voluntary acts: *Sanders v. Pope* (*c*) ; *Bowser v. Colby* (*d*). In *Malone v. Geraghty* (*e*), Sir Edward Sugden admits that equitable relief may be administered beyond the limits of the Redemption Statutes. It may be said that the taking of the bills amounted only to a waiver conditional upon their being paid; but we deny that a non-compliance with the condition can revive the penal provision of the Act. In *Sheridan v. Casserly* (*f*) redemption was decreed to the tenant, although the sum lodged by him in Court was less than the arrears of rent and costs, a part of the rent claimed by the landlord being secured by the tenant's promissory note, which, *though not paid*, would carry interest, and severed, so far, the actual arrear of rent as not to be within the penal clause of the statute; and Sir Anthony Hart expressed his belief that Courts of Equity had relieved against forfeitures on slighter distinctions than that. Even at law, after judgment in ejectment for non-payment of rent and execution executed, the forfeiture may be waived by the acts of the parties, *ex. gr.*, receipt of rent from undertenants:

(*a*) Wallis, 338; S. C. referred to in *Biddulph v. St. John*, 2 Sch. & Lef. 529.

(*b*) 1 Dru. & Wal. 380.

(*c*) 12 Ves. 282.

(*d*) 1 Hare, 109.

(*e*) 3 Dru. & War. 270.

(*f*) Beatty, 249.

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*Lessee Malone v. Malone* (*a*). If a tenant be permitted to continue in possession after an eviction for non-payment of rent and with the knowledge of the landlord to spend money in improvements, this will be deemed in equity a waiver of the forfeiture: *Hume v. Kent* (*b*). A Court of Equity will, where justice demands, interpose to prevent the enforcement of a judgment at law in its full rigour. It was so laid down by Lord Alvanley in *Hankin v. Broomhead* (*c*). *A fortiori* it will not put so strict a construction upon its own order as to work a forfeiture. The primary object of the parties was the payment of the rent, as appears on the face of the order, from the anxiety there expressed that the bills should be those of a solvent person. The penalty to secure that payment is the condition of forfeiture. The plaintiff having by his bill offered to do that which the penalty was given to secure, the Court will grant him relief against the forfeiture. In *Wadman v. Calcraft* (*d*), Sir William Grant says:—"When the rent is paid, the end is obtained, and therefore the landlord shall not be permitted to take advantage of the forfeiture." The observations of Parke, B., in *Doe d. Nash v. Birch* (*e*), were also mentioned on this part of the argument.

The Master had jurisdiction to make the order of the 28th of February 1848, because the jurisdiction in infancy resides in the Court and not in the Lord Chancellor alone: *2 Fonblanche*, p. 231; *1 Spence Eq. Jur.* p. 611, n. d, 614, n. g. The statute 4 & 5 W. 4, c. 78, s. 12, empowers the Master to make orders in cases referred to him. The 146th General Order authorises him to make orders in reference to proceedings by distress, notice to quit, or ejectment for non-payment of rent.

If the arrangement had taken place out of Court, the infant would have been bound by it. He was not bound to take the bills in payment, but he was bound to redeem, and redemption is the effect of receiving the bills in payment. "Whatever he is bound to do he may do," was the observation of Lord Mansfield in *Zouch v. Parsons* (*f*), citing *Conny's case* (*g*). There is evidence that the

(*a*) 1 Ball & B. 32, n.

(*b*) Ibid, 554.

(*c*) 3 Bos. & P. 611.

(*d*) 10 Ves. 69.

(*e*) 1 M. & W. 402.

(*f*) 3 Bur. 1801.

(*g*) 9 Rep. 85.

defendant himself (who was then near his full age) approved of the arrangement made by the Master, immediately upon its having been communicated to him.

The plaintiff is entitled to avail himself of any act done by the mortgagee for the preservation of the estate: *O'Reilly v. Fetherstone* (a); *Kent v. Roberts* (b).

The fact that the last *cestui que vie* died previously to the expiration of the nine months, is an additional reason why the Court should relieve, because there then ceased to be any legal estate subsisting.

The *Solicitor-General* (Mr. H. G. Hughes), Mr. *Greene*, Mr. *Close* and Mr. *T. Lefroy*, for the defendant.

The defendant does not object to this suit as defective because the mortgagee is not a party, but insists that, whatever equity the mortgagee may have had to maintain this bill, the plaintiff has no such right. Supposing that the mortgagee had the right and exercised it, the lease no doubt would be set up, and the tenant may, according to the doctrine of *O'Reilly v. Fetherstone* (c), avail himself of it; but if the mortgagee hang back and decline to enforce his right, it is too much to say that a tenant who has committed waste and offered a litigious opposition to the rights of his landlord can file such a bill after having pretermitted his own time for redemption. That would amount to holding that the mortgagee was under the Ejectment Statutes a trustee for the tenant. There is no such fiduciary relation between them: *Nesbitt v. Tredennick* (d). If the mortgagee file a bill to redeem and afterwards choose to dismiss it, it cannot be argued that the lessee has any power to prevent him.

The Master had no jurisdiction to make the order of the 28th of February 1848. After he gave permission to proceed by ejectment his authority ceased. The 146th General Order carried it no farther than that. The testamentary guardian objected to take the bills; the receiver had no authority to sanction such an order, nor had the Master to force it on the guardian. Who could have sued on the bills? Not the solicitor, to whose custody they were committed, nor the

(a) 4 Bli. 161; S. C. 2 Dow. & Cl. 39.

(b) 3 Ir. Eq. Rep. 279.

(c) 4 Bli. 161; S. C. 2 Dow. & Cl. 39.

(d) 1 Ball & B. 29.

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minor, by reason of his infancy, nor the testamentary guardian, who repudiated them. Even if this order were made upon the intervention of the mortgagee (which we deny), yet neither the Master nor the Court had power to extend the time. Conceding that the Master had jurisdiction to make the order, it follows that he had power to annex to it a condition; to relieve the plaintiff against that condition would not be to relieve against a penalty, but to enable a party to rescind his contract. If a mortgage be granted at £4 per cent. interest, with a condition that, if that be not paid regularly, the rate of interest shall be raised to £5 per cent., equity will relieve against that; but if the mortgage be in the first instance made at £5 per cent. to be reduced to £4 per cent. in consideration of prompt payment, in such case equity cannot interfere: *Jory v. Cox (a); Nichols v. Maynard (b); Stanhope v. Manners (c)*.

The time having expired, the plaintiff is without remedy. In *Bodkin v. Vesey (d)*, Joy, C. B., in dismissing a bill for redemption, says:—"The Ejectment Statutes are very express upon this subject, and preclude all right to relief both at law and in equity, unless the tenant pays into Court, within six calendar months after the execution of the *habere*, the rent, with costs." Lord Redesdale, in *O'Mahony v. Dickson (e)*, speaks to the same effect:—"If the bill be not filed and the money brought into Court within six months, the statute says that it shall not be competent for the party to try whether it (the rent) was due or not, to defeat the judgment in ejectment." In *Devereux v. Bradstreet (f)*, there had been a tender of the rent before the time had expired. In *Sheridan v. Casserly (g)*, the bill was filed in time, but the sum lodged was less than the amount. That case went very far; the Court would now scarcely strain its jurisdiction to the same extent.

Nov. 13.Judgment.

## The LORD CHANCELLOR.

I have attended to this case with all the anxiety which the circumstances are calculated to create, and with a solicitude to find any

(a) Prec. in Chan. 160.

(b) 13 Atk. 579.

(c) 2 Eden, 197.

(d) 1 Jo. Exch. R. 139; S.C. 4 Bl. 64.

(e) 2 Sch. &amp; Lef. 409.

(f) *Ubi sup.*(g) *Ubi sup.*

solid ground upon which I could base a judgment giving relief to the plaintiff. It is an unfortunate case arising from the embarrassments of an ancient and respectable family. But it is the duty of the Court to base its decision, so far as may be, upon grounds that will stand the test of legal argument and be applicable to all other parties. I confess with regret that I have been unable to find any foundation for a decision granting relief to the plaintiff. If this were a bill merely for a renewal, it does not appear to me that it could be resisted. Alleged waste by the tenant has been relied on for the defendant. But even although the evidence for the defendant on this subject had been more satisfactory than it is, I think that the circumstances put forward would not have been sufficient to disentitle the tenant to a renewal. As regards the cutting of the timber, there is a controversy as to the rights of the tenant, and he may perhaps have been entitled to do so to the extent which he has done. But that question constitutes the subject of a subsisting plenary suit in this Court, in which the parties may have further relief in the way of damages to the extent to which they may be entitled. With regard to the house, I heard nothing in the evidence of any thing beyond mere permissive waste, which, if the property were restored to the plaintiff, no doubt would be remedied. Nor could the litigation which has taken place nor the resistance offered have interfered with the power of the Court to grant a renewal.

Unhappily the case does not rest here; it is not simply a bill for renewal, it also seeks the right of redemption under the Ejectment Statutes for non-payment of rent. It cannot be questioned that an eviction (for non-payment of rent) of a lease for lives, with a covenant for perpetual renewal, not only evicts the lease for the actually subsisting life or lives, but also, when the six months allowed for redemption shall have expired, destroys the right to maintain a bill in equity for a renewal. Here the rent was due, the ejectment brought, the judgment had and *habere* executed in the due course of legal precedence. Although the possession was not disturbed, a lease of six months having been made to a trustee for the tenant, yet every thing was done that the law required; and the six months, allowed to the tenant to redeem, expired on the 28th of November 1847. Upon the 28th of February 1848, on which day the nine

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months, allowed for redemption by the mortgagee, would have expired, the arrangement, relied on by the plaintiff, was entered into in the Master's office. I do not think it necessary to enter into any scrutiny as to the particular interference of the various parties upon that occasion, or whether it was or was not a *bona fide* proceeding on the part of the mortgagee, or whether the tenant collusively or otherwise put himself into the position of the parties deriving under the mortgage. Nor does it appear to me to be important whether or not the Master had jurisdiction to make the order which he did. Unquestionably the infant was represented upon that occasion. I look upon what then took place as the deliberate arrangement of all the parties to it, which, if the agreement had been carried out, by payment of the bills upon their arriving at maturity, would have entitled the plaintiff to be restored to his original position as tenant. But I am unable to appreciate the argument, that where the parties stipulated that if the bills were not paid, the forfeiture should be complete, yet, in defiance of that condition, I am to say that the forfeiture has not taken place. I have not power to add one hour longer to the time provided by that agreement. I must hold it conclusive upon the plaintiff. It was a bargain extending the time allowed for redemption; one single step beyond what the parties have gone the Court cannot go. They stipulate that if the condition shall not be complied with, the statute shall have its full operation, and I cannot displace it on any reasoning which I have heard. It has not been contended that there has been any waiver of the terms of that arrangement.

The case has been very ably argued on both sides; extremely well argued by Mr. Carleton, and indeed I was at first struck by the point urged by Mr. M'Mahon, viz., that the last of the *ceux que vivent* had died previously to the expiration of the three months during which the mortgagee was at liberty to redeem; but upon consideration I do not see how it can affect the question of redemption. The words of the Acts of Parliament are imperative.—[His Lordship read the 2nd section of the statute 11 Anne, c. 2, and the 4th section of the statute 8 G. 1, c. 4.]—I cannot control these words; I feel compelled to say that the bill must be dismissed with costs.

1 *Reg. Lib. Gen.*, fol. 26.

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### WILLOCK v. DARGAN.

#### LOVE v. WILLOCK.

*Nov. 11, 12.*

On the 17th of May 1847 Henry Dargan executed his bond to his father Richard Dargan, conditioned for payment of £200. Judgment was entered on the bond, pursuant to a warrant of attorney, in Trinity Term 1847, and was afterwards duly registered. At the time of the rendition of the judgment Henry Dargan the conuzor was, under a lease of the 3rd of March 1846, possessed of a term of nine hundred and ninety-nine years in certain premises in the town of Lurgan. Subsequently to the entry of that judgment the defendant Love and his partner in trade, Mr. Stevenson Giveen, recovered in an action upon two bills of exchange a judgment against Henry Dargan; under an execution issued thereupon, the Sheriff of the county Armagh sold the leasehold premises, or rather so much of them as remained after a fire which consumed the dwelling-house built upon them. The defendant Love purchased them for himself alone for £50, which would appear to have been the full value; he obtained a conveyance from the Sheriff in December 1847, and had since expended upon them £650 in buildings and other permanent improvements. Whether or not the purchase was made by Love with or without notice of the judgment, was much disputed in the progress of the case; it was, however, ultimately held by the Court that upon the evidence he must be deemed to have purchased with notice. Richard Dargan by his will bequeathed to his son Henry Dargan one shilling, and certain houses and lands in the event of the death of his eldest brother under twenty-one years, but subject to numerous legacies; and bequeathed one legacy to his (testator's) daughter, which he desired to be paid out of the

A trader possessed of a chattel real acknowledged a judgment, and subsequently to its rendition the chattel real was sold under a *fieri facias* upon a puerne judgment, and the trader was afterwards declared a bankrupt; *Held*, that the first judgment was not levelled by the bankruptcy, and that its amount might be raised out of the chattel real in the hands of the purchaser, who was one with notice.

The conuzee of a judgment appointed the conuzor one of his executors; the will was proved by the other executor only; *Held*, that in equity the judgment debt was not extinguished, but was assets in the hands of the executor for payment of his testator's debts; and accordingly that lands of the conuzor, sold subsequently to the rendition of the judgment, were, in the possession of a purchaser with notice, liable to the discharge of the judgment debt.

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*bonds and notes* due to him, and appointed the plaintiff Willock and Henry Dargan his executors, and died. Willock alone proved the will, leave being reserved for Henry Dargan also to come in and prove it. In April 1849 Henry Dargan was declared a bankrupt. Willock in his capacity as executor filed a bill, against Henry Dargan and Love, praying payment of the judgment of Trinity Term 1847, and, if necessary, a sale of the leasehold premises. Love filed a cross-bill impeaching the validity of that judgment as having been entered by Henry Dargan in the name of his father Richard for the purpose of defrauding the creditors of Henry Dargan. The cross-bill alleged that Willock, the uncle of Henry Dargan, was in league with him for the same purpose, and prayed that the judgment might be declared fraudulent and void as against Love; that Willock should be decreed to execute a warrant to satisfy it, and that it should be satisfied, and that Willock might in the meantime be restrained from assigning over or proceeding upon the judgment.

Evidence was given on both sides with respect to the alleged fraud and want of notice. It is not important, for the purposes of this report, to refer to it more fully. The ruling of the Court on both points appears below.

A preliminary objection on the part of Love, that the assignee of Henry Dargan ought to have been a party to the first cause, was overruled.

Mr. O'Hagan and Mr. T. K. Lowry, for Willock, the plaintiff in the first cause.

Argument.

There is an absence of any proof of fraud in obtaining the judgment. It is plain too, upon the evidence, that Love purchased with notice; and inasmuch as the sale had taken place in 1847, it cannot be contended that the judgment was levelled by the bankruptcy of Henry Dargan in 1849, as insisted upon by Love in his answer. To this effect is the opinion of Sir Edward Sugden, expressed in *White v. Baylor* (a), where he distinguishes between the case of a mortgagee and that of a purchaser.

(a) 4 Dru. & War. 297; S. C. 5 Ir. Eq. Rep. 400.

**Mr. Christian** and **Mr. Burroughs**, for Henry Love, the purchaser.

The transaction is fraught with suspicion. Henry Dargan was plainly in insolvent circumstances at the time of the rendition of the judgment. There was no sufficient proof that Love had notice of the judgment; such notice the 8th section of the statute 7 & 8 Vic., c. 90, rendered indispensable where the title of a purchaser was impeached. That general statements of strangers to the title do not amount to notice appears from *Wildgoose v. Wayland* (a) and *Fry v. Porter* (b)—[The LORD CHANCELLOR. According to my opinion of the evidence Mr. Love must be considered to have had notice of this judgment.]—At all events the debt was extinguished by the appointment of Henry Dargan as one of the executors of Richard Dargan: *Sir John Nedham's case* (c). This rule is not confined to cases where the creditor appoints his debtor his sole executor, nor is it varied where the executor dies without having either proved the will or administered: *Wankford v. Wankford* (d); *Cheetham v. Ward* (e); *Com. Dig. Administration*, B, 5; *Williams on Executors*, pp. 1124, 1125. The principle of the rule is not that the nomination of the debtor to the office of executor merely extinguishes the legal remedy for the debt, but that the debt itself is absolutely discharged: *Freakley v. Fox* (f). If the debt be discharged it follows that the judgment has no longer any effect as against the lands, inasmuch as a release of the debt is a release of that which is but a collateral security for it: *Couper v. Greene* (g); *Hartley v. O'Flaherty* (h). In *Ryan v. Cambie* (i) it was held that the creditor, by his omission to re-docket a judgment, thereby exonerated one denomination of land originally liable to it, and casting the entire debt upon the other, without affording a right of contribution to that other, did not thereby lose his right to go against the latter for the whole amount; but your Lordship, in giving judgment,

(a) *Golds. Rep.* 147.

(b) *1 Mod.* 300.

(c) *8 Rep.* 136, a.

(d) *1 Salk.* 299.

(e) *1 Bos. & Pul.* 630.

(f) *9 B. & C.* 130; *S. C.* 4 *Man. & Ry.* 14.

(g) *7 M. & W.* 633.

(h) *Li. & G. temp. Plunket*, 208.

(i) *9 Ir. Eq. Rep.* 393.

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observed, that if the creditor executed a release or other matter of that kind, the decision might have been otherwise. Equity might treat the debt to be assets in the hands of the executor so as to order him to bring the money into Court, but never would extend that doctrine to land in the hands of a purchaser, who manifestly never would have purchased if he had *actual* notice of the judgment.

Mr. Lowry, in reply.

The terms of the will of Richard Dargan preclude all supposition of an intention on his part to release the debt, and that intention will be regarded in the decision of this question : *Stapleton v. Truelocke* (a). If there be not assets sufficient for the payment of the debts of the testator, the executor is answerable for his own debt to the creditors of the testator : *Butler's Co. Lit.* p. 264 b, n.

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*Judgment.* My present impression is, that unless Henry Dargan could resist the payment of this demand, it is difficult to perceive how Mr. Love can resist its being raised out of the premises which he purchased. As well as I recollect, the executor's debt is in his hands deemed assets in equity for the payment of the testator's debts. I shall look into the authorities. On all the other points of the case I think Mr. Love has wholly failed.

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#### The LORD CHANCELLOR.

*Nov. 12.* In this case I confess that I heard with some surprise the objection that the debt was extinguished in equity by the appointment of Henry Dargan, the obligor in the bond, to be one of the executors of the obligee. It cannot for a moment be supposed that it was the intention of the testator to release the debt, inasmuch as by his will he leaves one shilling to Henry Dargan, and out of "the bonds and notes due to him" (the testator) directs a legacy to be paid. In *Brown v. Selwin* (b) Lord Talbot says :—"It was never doubted but a debt due from an executor to a testator shall

(a) 3 Leon. 2, pl. 6; S. C. Moo. 11. (b) Cas. temp. Talbot, 240.

be assets in the executor's hands to pay debts; for if the testator had expressly given it away, even that could not have screened it from debts; so the testator may give a legacy out of a debt due to him, as in *Flud v. Ramsey* (*a*), which authority is right; the implied gift by making the debtor executor may be controlled by an express gift, or by a devise of all his debts." In *Carey v. Goodinge* (*b*) Lord Thurlow said, that he thought it had been a settled point in equity, that the appointment of the debtor executor was no more than parting with the action, and declared the executors to be, in respect of their debts to the testator, trustees for the next-of-kin. So too in *Berry v. Usher* (*c*) Sir W. Grant, M. R., treated the point as perfectly settled, and it was given up for the defendant without argument. I have no difficulty in saying that the executor was not released; and if he were not, it follows *a fortiori* that the land was not released. I do not therefore enter into the question whether, even if the executor had been released as executor, the lands would also be discharged.

I am sorry for the defendant Love, who appears to have made an imprudent purchase; but I have no power to relieve him from the present demand.

Decree to account in first suit. Bill dismissed in cross suit.

(*a*) *Yelv.* 160.

(*b*) *3 Bro. C. C.* 110.

(*c*) *11 Ves.* 90.

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**STOKES v. COLTSMAN, CRONIN and others.**

*Dec. 7, 14, 16.*

Where upon a petition presented, under the Court of Chancery Regulation Act, by a creditor on behalf of himself and all other creditors of a deceased person, for administration of his real and personal assets, the usual order of reference to the Master has been made under the 15th section of the Act, the Court will not dismiss the petition on payment to the petitioner of his debt and costs, inasmuch as the order of reference is equivalent to a decree to account in a plenary suit, and therefore confers upon the other creditors an interest in the proceedings.

THIS was a petition under the Court of Chancery Regulation Act, to recover the sums secured by two judgments; and prayed an account of the real and personal assets of the deceased conuor, and, if necessary, a sale of the real estate. It was presented as well on behalf of his other creditors as of the petitioners.

Mr. *De Moleyns*, for the petitioners, moved for a summary order of reference (without notice) under the 15th section of the Act.

Mr. *T. Galwey* informed the Court that he was professionally aware that a petition for the administration of the same estates was in preparation on behalf of the respondents, the present proprietors.

The LORD CHANCELLOR.

It is plain that the estates must be sold. I do not see any reason why the usual order should not be made upon the present petition.

The order then made was as follows:—

“His Lordship doth order that it be referred to William Henn, Esq., the Master of this Court in rotation, to consider the matter of the said petition and proceed thereon pursuant to the statute.”

*Dec. 14.*

Mr. *Brewster* (with whom were Mr. *Deasy* and Mr. *T. Galwey*), for Daniel Cronin Coltsman, one of the respondents and tenant for life of the real estates, now moved (upon notice) that the petition might be dismissed upon the terms of his paying to the petitioners forthwith the sum of £730. 7s. 7d., being the amount claimed by them for principal and interest, together with all further interest which might accrue, and also upon payment of all their costs when

taxed, and that the petitioners might, upon such payment, be directed to assign to a trustee for D. C. Coltsman the two judgments mentioned in the petition.

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Mr. *De Moleyns*, for the petitioners, here said that they were ready to accept payment of the debt and costs, and to have the petition dismissed, should the Court think fit. That it was for the Court to say whether or not the petitioners were, by the order of reference, placed in the same position as a plaintiff who has obtained a decree to account in a suit on behalf of himself and all other creditors. Before such a decree the plaintiff is *dominus litis*, and may dismiss his bill if he please; but after a decree to account he is bound to prosecute the suit as trustee for the other creditors: *Handford v. Storie* (*a*), where the reason assigned for the rule is, that before decree no other person of the class is bound to rely upon the diligence of him who has first instituted the suit, but may file a bill of his own; but after decree no second suit is permitted. To the same effect is *Pemberton v. Topham* (*b*). The 22nd section of the Court of Chancery Regulation Act, restraining other creditors from suing where a decree or order is made in an administration suit, would appear to confer upon this order of reference the chief characteristic of a decree to account with respect to its effect upon third parties. The petitioners thought it their duty to take the opinion of the Court before accepting the terms offered, and consenting to the dismissal of the petition.

The *Solicitor-General*, Mr. *J. D. Fitzgerald* and Mr. *Jenkins*, for other creditors, in opposition to the motion, relied on the arguments put forward by the petitioners' Counsel, and cited in support of them the opinion of Sir A. Hart in *White v. Lord Westmeath* (*c*) and *Lashley v. Hogg* (*d*). They also said that the sole object of this motion was to obtain the carriage of the proceedings, it being admitted that the respondents or some of them intended to present a petition for the administration of the estates; that the creditors

(*a*) 2 S. & St. 197.

(*b*) 1 Beav. 317.

(*c*) *Beatty*, 177.

(*d*) 11 Ves. 602.

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would have more confidence in proceedings conducted by one of themselves than by those persons whose interest it might be to retard such proceedings. That during the pendency of this petition no creditor could proceed to enforce his claim—he could not do so in equity, inasmuch as the Court would dismiss his petition (as it had already done in some similar cases) because of the previous order of reference upon this petition, under which, if prosecuted, he may obtain relief—he could not proceed at law, because the 22nd section of the Act expressly prohibits him from doing so. Thus the order of reference raises the rights of the creditors under the petition to higher ground than the decree to account in an ordinary suit, the decree only giving the right to apply for an injunction to stay other proceedings, whereas the order of reference has the effect absolutely of preventing such proceedings. Suppose this to be the case of a petition on which an order of reference of long standing had been pronounced, if the respondents were to be at liberty to procure a dismissal of the petition on payment of their debt and costs to the petitioners, the claims of the other creditors, or some of them, might have become barred by the Statute of Limitations in the meantime. The order of reference should be held to have an analogous effect to that of a decree to account, and so to give to creditors a beneficial interest in the order, of which advantage they may not be deprived by any possible collusion between petitioners and respondents.

Mr. Deasy, in reply.

The practical effect of the argument (if sound) for the other creditors would be, that from the moment of the institution of his proceedings a petitioner, even though immediately paid off, must at the risk of costs continue a litigation to him useless. In a suit by bill on behalf of the plaintiff and all other creditors, upon payment of the plaintiff's demand, the suit might at any time be stayed before decree. In *Damer v. Lord Portarlington* (*a*), which was a suit for the execution of the trusts of a deed, the Court, at the instance of the owner of the estates, stayed all the proceedings on payment to the plaintiff of all his pecuniary claims in the suit and costs,

(*a*) 2 Phil. 30.

although the plaintiff insisted that the execution of the trusts in the deed would incidentally effect other objects in which he was interested in reference to the estates comprised in it, and although the suit was nearly ripe for hearing. Lord Cottenham there said :—"Upon the general principle there can be no doubt that where a suit is instituted, and the defendant comes and tenders all that the plaintiff asks, there is jurisdiction in the Court to prevent the plaintiff from going on." That principle is also illustrated by *Holden v. Kynaston* (*a*), before Lord Langdale. The order made here is *ex parte*, and is the initiation of the suit, being analogous to the filing of a bill. The Master decides upon whom service of notice is to be made. The Court is but the mere conduit into his office. This order is the first judicial notice to the debtor to pay the debt. The 22nd section applies only to proceedings at law, and there is nothing to prevent creditors from suing here. New petitions may and have been consolidated with petitions already pending. In no respect is this order equivalent to a decree to account. It appears upon the affidavits that, notwithstanding the difficult circumstances of the times, these estates have been so well managed that there is not upon any incumbrance more than one year's interest due. Being a creditor, as well as devisee of the estates, Mr. D. C. Coltsman is most interested in the economical administration of them, and therefore ought to have the carriage of the proceedings.

#### The LORD CHANCELLOR.

I am quite satisfied that it was a perfectly safe course to make the order of reference upon this petition. I made it on a statement that a petition was in preparation by the respondents themselves to have the same thing done. It was a case in which I should otherwise have directed notice to be served upon the parties. I generally take care, where it is possible that any answer can be given, that such notice should be served, and I do not think that this can be called a summary order made behind the back of the parties. If, at the time of making the order, it had been suggested that there was any intention of paying off the petitioners, I should have allowed the case to stand

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(a) 2 Beav. 204.

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over. I shall therefore regard the case as, in effect, one in which the parties had full notice of the application. The question is, what is the effect of this order? The real meaning and object of the 15th section of the Act was to transfer cases as quickly as possible into the Master's office and so to avoid delay and the expense of bills, answers, &c. The consequence is that every question or point of defence, that can arise or exist, is open to the parties in the office as fully as in a regular suit. The operation of that section is, in administration cases, affected by the 22nd section, which is very peculiar, and would seem to give to an order of reference the effect of a decree to account. That section restrains a creditor or any other person from proceeding by action against either the executor, heir or devisee so long as any such order remains in force. The consequence of not holding this order of reference as equivalent to a decree to account, might be, by means of that section, to leave a door open to great injustice if at the same time it gave no right to the creditors. A petitioner might keep the order in abeyance, and in the meantime the creditors would be stayed from proceeding, and perhaps their claims be barred by lapse of time. There is I think therefore an inference to be drawn from that section (the 22nd) that the summary order of reference gives the creditors some benefit under it. The Master is to consider the whole matter of the petition; if he find that no debt is due, the petition would of course fall to the ground. The difficulty is, what stage of the proceeding is to be considered as the terminus, whence the creditors are to have the benefit of the petition, if it be not the order of reference? If not, from what particular point are they to be considered as interested in the proceedings? My present impression is that the order of reference is that point. In this case no greater mischief is suggested than the substitution of one petition for another. No doubt cases may occur which would place estates improperly under the Court; but such instances will be rare, if any.

I think that the balance of convenience is in favour of so construing the order of reference under the 15th section when read in connexion with the 22nd section.

I do not see any good which could result in this particular case

by my setting aside the order, because other creditors would immediately present another petition.

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**Mr. Brewster.**

We are ready to pay off the petitioner and to indemnify him from further costs if we are allowed to have the carriage of the order.

**The LORD CHANCELLOR.** .

Without prejudging this particular case, I may say that it is not usually advantageous to allow the proprietor to have the carriage of proceedings against his own estate. That, however, is a question for the Master. In a petition for administration, after pronouncing the order of reference, the Court may never have the cause again before it until there is a motion to allocate funds produced by a sale. The Master has full power. I shall look into the question before finally deciding it.

Judgment.

**The LORD CHANCELLOR.**

I am quite unable to discover any proceeding which can be deemed in the same light as a decree to account, unless I adopt the order of reference—an analogy raised by the statute itself. The 22nd section clearly puts the order of reference, for the purposes therein mentioned, on the same footing as a decree to account in a plenary suit. There may be inconveniences in adopting that construction, but it is difficult to do otherwise. As to the words of that section, "so long as any such order remains in force," I apprehend that means so long as the matter is pending in the office. If the order be set aside as irregular, or if the matter fail by the petitioner not succeeding in proving a debt, then those words would have their effect. But it is begging the question to say that these words contemplate that the order may be set aside on such a motion as this. If the creditors have gained rights under the order, those rights cannot be so taken from them. The Court must therefore be very careful in making these orders, and in requiring notice where it may be necessary; but not in every case, because that would directly defeat the Act in one

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of its purposes. Here the great object is to have the carriage of the accounts, it being confessed that the aim of this motion is to get rid of this petition in order that another may be put on the file by the proprietor of the estate. But when once a case is in the office the creditors can force it forward; and if any delay take place the Master can change the carriage of the petition. I see no objection however in this particular case to the presentation of a petition by the applicant, on whose own estate the expense must fall, and my making a summary order upon it, and consolidating both petitions; then it will be open to the Master to deal with the future conduct of the proceedings as may be proper.

The present motion I refuse, without costs.

[The course suggested by his Lordship was afterwards adopted.]

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## GLASCOCK v. ROSS.

Cause petitioned under the Court of Chancery Regulation Act, presented by Eliza and Anna Glascock, who claimed estates in common in remainder, after the life estate of their father Walter will be heard in the first instance on Glascock, in the lands of Coolnecartes, under a settlement executed the petition and affidavits filed in support of or in opposition to the same, and on the answers to any interrogatories which may have been filed; and on such hearing the Court may direct that all or any of the matters stated in such petition or affidavits, which it may be necessary further to have proved or inquired into, shall be so proved or inquired into by further affidavits, or by *vivd voce*, or written examination, or by the trial of an issue at law, or otherwise, as may be deemed most suitable to the nature of the case, and appoint the mode and times of examination as may be most expedient, and reserve further order and directions thereon until after such proof and inquiry shall be had.

Leave given to a mortgagee defendant to file a supplemental answer to a cause petition, varying in some measure the statement of his title to the mortgage as put forward in his original answer, and putting in issue a deed under which he claimed, but which he had forgotten to mention in his original answer.

*Sembler*—Mere inconsistency between the proposed matter of defence and the original defence is not sufficient ground for refusing leave to a defendant to file a supplemental answer.

upon his marriage, and bearing date the 13th of October 1806, but not registered until subsequently to the execution and registry of a deed of the 10th of October 1810, conveying the same lands by way of mortgage for £2000 to Trevor Corry and James Splaine Biggs, in trust for Colonel Ross. The petition stated that after the death of Colonel Ross, Walter Glascock being desirous to pay off the mortgage debt, and believing the widow of Colonel Ross to be entitled absolutely to it, had by deed of the 19th of May 1823 conveyed his life estate in the lands to Mr. Orpen during the joint lives of him (W. Glascock) and Mrs. Ross, in trust to apply the rents first in discharge of the interest payable on a small prior incumbrance; and secondly in discharge of the mortgage debt; that Mr. Orpen entered into receipt of the rents, and that the payments by him to Mrs. Ross until her death in 1845 amounted in the whole to a sum nearly sufficient to discharge the mortgage debt. The petition prayed that the mortgage should be declared fraudulent and void as against the petitioners, inasmuch as they alleged that Colonel Ross and James Splaine Biggs had notice of the settlement at the time of the execution of the mortgage, and inasmuch also as they alleged that the mortgage affected the life estate of Walter Glascock only. The petition also prayed that the respondent David Ross of Bladensburg (the eldest son and heir of Colonel Ross) might be restrained by injunction from using the deed of mortgage so as to claim, deal with, or affect the inheritance in the lands, and from conveying or aliening any greater estate in the lands than for the life of Walter Glascock, or from taking any proceeding for the purpose of raising the principal sum of £2000 out of the lands save out of that life estate.

This petition was filed on the 30th of September 1850, and notice of it was served upon David Ross of Bladensburg on the 1st of October following.

He, in an affidavit filed on the 16th of November 1850, and made in reply to interrogatories annexed to the petition, denied that Colonel Ross or James Splaine Biggs had notice, either actual, or constructive, of the settlement, and insisted on the validity of the mortgage, and of its priority over the settlement, as a charge upon

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the fee of the lands. The affidavit also stated that the deed of the 19th of May 1823 was not such as was alleged in the petition, but was a conveyance to Mr. Orpen as trustee during the life of Mrs. Ross, if Walter Glascock should so long live, for the purpose of securing the interest and arrears of interest then due on the mortgage debt to which she was entitled during her life under the will of Colonel Ross, and that, subject to her life interest, the respondent David Ross "was entitled under the same will to the money secured by the mortgage, and that he is now absolutely entitled to the said principal money." Another passage of the affidavit, nearly to the same effect, was:—"And this deponent saith that he claims to be entitled to the whole principal sum secured by the said mortgage and to interest thereon for — years last past, and he claims the same under the will of his father (Colonel Ross), bearing date the 29th of December 1810, by which he bequeathed the interest of the said sum so secured by the said mortgage as part of his personal estate to his wife for life, and subject thereto bequeathed the principal thereof as part of his personal property to this deponent absolutely."

Mr. Brewster, with whom was Mr. Molyneux, moved on the part of the petitioners, that in pursuance of the statute 13 & 14 Vic. c. 89, his Lordship might be pleased to direct that so much of the evidence in this matter as the petitioners might be advised to give for the purpose of proving handwriting to deeds and documents might be taken by affidavit, and that all the other evidence should be taken by examination on interrogatories or *viva voce* at the hearing, as his Lordship might think fit and be pleased to order; and if by examination on interrogatories, then that his Lordship might be pleased to name a day when such examination should close and publication pass, and also that the respondent should lodge with the proper officer of the Court certain specified deeds referred to in the petition and in the answering affidavit already mentioned.

Mr. W. Carey Dobbs moved a cross notice on behalf of the respondent for leave for him to file a supplemental affidavit.

The proposed supplemental affidavit stated that the rights of the respondent David Ross of Bladensburg, with respect to the sum of £2000 secured by the mortgage of the 10th of October 1810, appeared to be fully set forth in an indenture of the 13th of December 1843, made between Mrs. Ross and the respondent of the first part, Robert Ross of Bladensburg, younger brother of the respondent, of the second part, and certain trustees of the third part, reciting the mortgage deed of the 10th of October 1810 as a mortgage to James Splaine Biggs and Trevor Corry for two sums of £1000 each, in trust as to one sum of £1000 for the uses expressed in the settlement of the respondent's father, Colonel Ross, and as to the remaining £1000 in trust for Colonel Ross, his executors, administrators and assigns; and further reciting that the uses expressed in the settlement of Colonel Ross, with respect to the first mentioned sum of £1000, were to form a provision for younger children of Colonel Ross; and that Colonel Ross charged certain lands by his marriage settlement with £2000 Irish for his younger children, and that his only younger child was Robert Ross of Bladensburg; and that Colonel Ross by his will charged his real and personal estate with the payment of a portion for Robert, exceeding in amount what he would have been entitled to under Colonel Ross's marriage settlement, and that Robert had agreed to receive the portion so charged by the will in lieu of any portion under the settlement; and also reciting a deed (contemporaneous with that of the 13th of December 1843) whereby Mrs. Ross and the respondent had secured the payment to Robert of the portion given by the will of Colonel Ross, by limiting the lands and premises therein described to trustees for a term of ninety-nine years, on trust to raise and pay to him the same portion in manner therein mentioned; and further reciting an agreement by Robert for the considerations thereinbefore contained, to release all the real estate of Colonel Ross, and the said sum of £1000 from the portion provided for younger children by Colonel Ross's settlement, and also to release all Colonel Ross's personal property from the portion provided for younger children by his will; and further reciting an intended marriage between the respondent and the Honorable

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H. M. Skeffington, and that Trevor Corry was dead and had left James Splaine Biggs him surviving.

The affidavit then stated that, by that indenture of the 13th of December 1843, Mrs. Ross and the respondent assigned to the trustees of that deed the principal sum of £2000 secured by the mortgage deed of 1810, upon certain trusts. And it was declared that James Splaine Biggs should hold that sum in trust for those trustees; and the trusts upon which they were to hold it were declared to be as follows—viz., to pay the interest to Mrs. Ross during her life until the happening of a specified event, in which case the principal sum of £2000, or so much of it as might be necessary, was to be applied in the purchase of a certain annuity during the joint lives of Mrs. Ross and H. M. Skeffington, and the interest of the residue of the principal was to be paid to Mrs. Ross during her life, and after her decease upon trust to pay the principal or so much thereof as should remain after the purchase of the annuity to the respondent, his executors, administrators and assigns, for his own absolute use. The affidavit then stated that by the same indenture Robert Ross of Bladensburgh released the sum of £1000 (moiety of the £2000 mortgage money), and the lands and premises charged with the payment of the portions provided by the marriage settlement of Colonel Ross for younger children, and the personal estate of Colonel Ross from the payment of the portions for younger children charged by his will upon his real and personal estate, to which he (Robert) then had or thereafter should have any claim under the will of Colonel Ross; that Mrs. Ross died in 1845; that the event on which the annuity was to be purchased had never arisen, and that accordingly the respondent became absolutely entitled, by virtue of the trusts of the indenture of the 13th of December 1843, to the sum of £2000, secured by the mortgage of the 10th of October 1810.

In explanation of the omission to state the indenture of the 13th of December 1843 in the first affidavit, the solicitor of the respondent made an affidavit, alleging that he (the solicitor) had not become acquainted with the existence of that indenture until after the filing

of the first affidavit, that indenture having by mistake been retained by the former solicitor of the respondent when delivering up his other documents, papers, &c., to the present solicitor.

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**The LORD CHANCELLOR.**

I do not think that I can possibly dispose of the motion made on behalf of the defendant Mr. Ross without an affidavit from himself accounting for the omission which he now seeks to supply. Nor, from the general view which I take of the Court of Chancery Regulation Act, do I think that it is at all necessary to comply with the motion made on behalf of the plaintiff. It may be convenient that I should now state what that view is.

*Judgment.*

The Act was, as I conceive, passed for the purpose of introducing into all the subjects of equity jurisdiction the ordinary system of proceeding upon petition, which had been previously found available for certain purposes of the Court. It therefore studiously draws a line of distinction between proceedings by petition and proceedings in a plenary suit. It does not prevent any person from filing a bill if he please so to do. No doubt the Court would have jurisdiction to deal with the costs of such a suit, if improperly instituted, so as to prevent any onerous result to the defendants; but there is nothing in the Act which precludes the filing of a bill if the claimant so desires. Again, the Act gives the Court power to insist upon the course by plenary suit being pursued, if it shall appear that the relief prayed cannot be safely or conveniently granted on petition, or that the object of the petition cannot be safely or conveniently attained under the procedure of the Act. In addition to this the Court is invested with authority, should any respondent apply to it for the purpose, to direct that the proceedings by petition should not be further proceeded with, and that a plenary suit should be instituted, and the Court has power in that case to make such provision with regard to the costs as it may think fit. It appears to me therefore that the Act, in adopting the course of proceeding by petition, did not intend that it should be encumbered by the forms of a plenary suit. The course of proceeding by petition was already well known. It was a very simple one:—first, the petition was

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brought to the Secretary's office, the Chancellor then made a fiat upon it, and when the petitioner obtained an order for hearing he served notice on the respondents, and that notice was brought on to be heard upon the expiration of two days. The petition was frequently merely made as ancillary to further inquiry, and accordingly upon the Trustee Acts and others of a like nature, the course adopted was a reference to the Master to inquire whether the case was one within the Act relied on. Such was the course in the first instance applicable to all cases of petition before the passing of this Act. What is there in the Act to introduce a difference between petitions under it and petitions under former Acts? There are no doubt some points of difference, but not many. One of those is in the power given to the petitioner to annex interrogatories to his petition. I say nothing as to whether or not the permission of the Court to do so must in the first instance be obtained by him. Again, the Act provides that to a certain extent the practice as to those interrogatories shall be the same as the practice as to answers to bills or cross bills; but it expressly provides that the answer shall be taken in the same way as an affidavit. Another variation is in the short mode of verification by affidavit, permitted by the 5th section of the Act. There is reason to believe that anciently the form of verification of petitions by affidavit was short and in some degree similar to that now introduced by this Act. However a different practice arose from an order made on the 6th of November 1712 by Lord Chancellor Phipps, "that for the future no affidavit be annexed to the petition that the contents of the petition be true; but that the parties do make an affidavit of the facts." Another point of distinction is in the power given to the respondent to exhibit interrogatories to be answered by the petitioner as if a cross bill had been filed.

The Act does provide that these petitions are to be entitled "cause petitions," and are to be heard before the Lord Chancellor, and that the proceedings are to be filed in the Rolls office; but these are mere formal regulations, and with that exception the word "cause" is not introduced into the Act. Taking it then that these petitions, with the special exceptions introduced by the Act,

are to be dealt with as petitions previously have been, it will plainly be in the power of the parties according to the practice of the Court in such matters to file their own affidavits, or those of any other person who may be able to support or resist the case sought to be made by the petitioner; and in fine, I apprehend that all this Act substantially does, as distinguished from the former course of the Court in petition matters, is to authorise the petitioner to annex interrogatories to his petition, to verify his petition in a short affidavit instead of a full one, and to enable the respondents to file interrogatories. In this way the Act is most beneficially calculated to bring the parties and the matter of their respective allegations before the Court as speedily and cheaply as possible. The Court no doubt has power given to it by the Act to direct evidence to be taken *vivâ voce*, or upon affidavit as well as upon interrogatories; but I conceive that those directions are to be given, if necessary, upon the hearing of the petition itself; and this course appears to be most conformable to the spirit of the Act. The Court can then see whether there is any occasion for further inquiry, or whether it will be proper to issue a commission, or send the case to the Master's office, or direct *vivâ voce* evidence to be taken, &c.; in other words, to determine the case at once, or to put it in a train of further investigation. But to introduce a system of preliminary interrogatories, would amount to the re-introduction of all the expensive machinery so much complained of before the enactment of the statute, and would do nothing towards forwarding the real objects of it. I see no difficulty in acting upon this view of the statute. When the case comes before the Court it can, if the cause then appear ripe for the purpose, determine the matter upon affidavits; but if the case appear a fit one for a commission, or for *vivâ voce* evidence, or for the exhibition of interrogatories, or to have a bill filed or an issue tried, or a trial at law had, the Court can at that time make the proper direction.

It was, I am sure, the intention of the Act to bring the parties face to face, if I may use the expression, as soon as possible, and if the case is not then sufficiently explicit, the Court may do that which will enable it finally to adjudicate upon the matter. I do not say  
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that difficulties will not occasionally arise by adopting this course; but it would be much more dangerous to introduce a preliminary examination by interrogatories or otherwise. The Court has I think full power to decide the case upon affidavits if the necessary information shall appear upon them, and in ninety-nine cases out of a hundred further investigation will not be requisite. It would be a return to the old system of special or general replications to require the evidence to be formally taken in the first instance.

I have endeavoured to obtain the concurrence of his Honour the Master of the Rolls to a set of General Orders which I had prepared under the provisions of the Act. I am sorry to say that I have not been as yet successful in obtaining that concurrence to those Orders, his Honour, upon, I am sure, conscientious grounds, having declined to concur in several of them. One of them was substantially in the terms in which I have just expressed myself to the Bar. I shall read it. It was as follows:—

“That all cause petitions under the said Act shall be heard in the first instance on the petition and affidavits filed in support of or in opposition to the same, and on the answers to any interrogatories which may have been filed, and on such hearing the Court may direct that all or any of the matters stated in such petition or affidavits, which it may be necessary further to have proved or inquired into, shall be so proved or inquired into by further affidavits or by *viva voce*, or written examinations, or by the trial of an issue at law or otherwise as may be deemed most suitable to the nature of the case, and appoint the mode and times of such examination as may be expedient, and reserve further order and directions thereon until after such proof and inquiry shall have been had.”

As I have stated I have not obtained the assent of the Master of the Rolls to the Orders I prepared; but I do not think it essential to have this particular proposition established in a General Order, and therefore I have not again proposed it to the Master of the Rolls, because it appears to me to be within my discretion to announce it, not as a General Order of the Court, but as the guide of my own course of judicial practice. I do hope to be able to issue a body of Orders upon which both the Master of the Rolls and I

shall finally concur. I have received some useful suggestions and assistance from him, but have been unable to obtain his assent to all which I have proposed. I hope, however, to be able in the meantime to go on with the business of the Court upon the principles which I have now announced, and I am glad for the sake of the Profession and the public that this motion was brought forward, as it has afforded to me a fit occasion upon which to make this statement of my view of the Act.

It is open to the defendant Mr. Ross to make an application under the 4th section for the institution of a plenary suit if he be so advised.

**Mr. Dobbs.**

We expect that the Court will of its own accord direct, under the 3rd section, the institution of such a suit.

**The LORD CHANCELLOR.**

In either case you would have an opportunity of remedying the defect in your affidavit by your answer.

**Mr. Brewster.**

It is unnecessary for us to press our motion now with respect to evidence, the Court having stated its intention of hearing the case in the first instance upon affidavits, and of dispensing with strict proofs.

**The LORD CHANCELLOR.**

Very well. Let the other motion stand until Saturday for the production of an affidavit by Mr. Ross.

On this day was produced to the Court an affidavit by the defendant David Ross, in which he stated that at the time of filing his former affidavit he had forgotten the existence of the deed of the 13th of December 1843. That previously to the filing of this cause petition he had presented a petition in the Incumbered Estates Court for a sale of the lands comprised in the £2000 mortgage,

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and, in subsequently endeavouring to satisfy that Court as to his title to the mortgage money, about the 27th or 28th of November 1850 he recollects that he had acquired his right under the deed of the 13th of December 1843, and thereupon informed his solicitor of the fact, and was surprised to find that the latter had not the deed. The respondent then confirmed the statement of his solicitor as to the obtaining of the deed from the former solicitor, and denied that he had any intention to suppress it. He also stated that since the execution of that deed the security then given to his brother Robert Ross of Bladensburg had been paid off in money.

Argument.

Mr. *W. Carey Dobbs* now renewed his motion for leave to file a supplemental answer.

Mr. *Brewster* and Mr. *Molyneux*, contra.

This must be looked on as an application after issue joined, and therefore too late: *M'Dougal v. Purrier* (*a*). The proposed defence is in direct contradiction to that set up by the original answer, and cannot be now made. The neglect to make it in the first instance must be fully accounted for: *Young v. O'Reilly* (*b*); *Bell v. Dunmore* (*c*).

Mr. *Dobbs*, in reply.

On examination the new matter of defence will be found only additional to, and not inconsistent with, the original defence. The omission has been amply explained by the defendant's affidavit. Leave to file supplemental answers was granted in *Nail v. Punter* (*d*), and in *Jackson v. Parish* (*e*), a stronger case than the present.

#### The LORD CHANCELLOR.

Judgment.

I think it would be an act of injustice towards this defendant not to permit him to put this deed in issue. He has in my opinion suffi-

(*a*) 4 Russ. 486.

(*b*) 5 Ir. Eq. Rep. 519.

(*c*) 7 Beav. 283.

(*d*) 4 Sim. 474.

(*e*) 1 Sim. 505.

ciently accounted for not stating it in the former affidavit. The supplemental affidavit does not wholly vary the case from that put forward by the original affidavit, by which he claims to be interested in the mortgage of £2000 under the will of his father, because it now appears from the proposed affidavit that to a moiety of that mortgage he is so entitled, and that to the remaining moiety he is entitled by an arrangement with his younger brother growing out of the will of their father. Were inconsistency with the original affidavit a sufficient ground for refusing a defendant permission to file a supplemental affidavit, I do not think that this case would fall within that objection. But mere inconsistency does not appear of itself to have been considered a sufficient ground for not allowing a supplemental answer. To that effect was the case of *Jackson v. Parish* (a), cited by Mr. Dobbs, where the defendant was permitted after replication to file a supplemental answer to a bill for dower in order to state a fine and non-claim which had been omitted, through ignorance, in his answer. In the judgment of Lord Cottenham, in *Fulton v. Gilmore* (b), he refers to *Patterson v. Slaughter* (c), into the facts of which, the report having been doubted, he caused search to be made. The defendant there claimed an estate as against the plaintiff under a devise from Sir G. Warburton, whom he stated in his answer to be heir of Richard Egerton. He afterwards discovered by a paper communicated to him that Sir G. Warburton had also a title as mortgagee, and that he (the defendant) had incorrectly stated the pedigree. The application was for leave to amend the record for the purpose of making these new facts available for his defence. Lord Hardwicke gave leave to amend the pedigree, confining the amendments to setting out the variations from the former answer applicable to that point. Those amendments in fact suggested entirely a new defence. That decision therefore shows that the inconsistency of the proposed supplemental matter with the original defence is not of itself a sufficient ground for disregarding the application.

In the present instance the new facts are partly consistent with

(a) 1 Sim. 504.

(b) 1 Phil. R. 522, 528.

(c) Ambl. 292.

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the case at first made by this defendant, and the circumstances attending the omission have been satisfactorily explained. It is however perfectly right and necessary that the Court should very sparingly and cautiously admit the correction of facts. In *Fulton v. Gilmore*, which I have already mentioned, the filing of a supplemental answer was allowed under the following circumstances.—  
 [His Lordship here referred at length to the facts of that case.]

Lord Cottenham there concludes by saying:—"There is nothing in the pleadings to enable me to say that this is an unrighteous defence. If I were to attempt to come to such a conclusion from the facts before me, I should run the risk of doing great injustice." The same observations would apply here. It would be a great injustice to prevent Mr. Ross from putting forward this deed; of course he must pay the costs of this application, and the petitioners must be at liberty to file an amended petition, and if necessary to exhibit further interrogatories.

The necessity of retaining junior Counsel in cause petitions considered.

NOTE.—It may not be altogether inappropriate to subjoin to the above case, treating, as it does, of the intended practice upon the hearing of cause petitions under the Court of Chancery Regulation Act, a statement of what occurred in *Russell v. Bevan* in reference to the necessity of retaining junior Counsel upon such occasions. That case came on for hearing on the 7th of February 1851, being one in the general list of cause petitions, and not under the 15th section of the Act.

Mr. George of the Inner Bar stated the petitioner's case.

Mr. William Smith, on the part of the Outer Bar, observed that no member of it had been retained to open the petition, and said that in causes it was an established rule that bills and answers must invariably be opened by junior Counsel, and that rule should be applied to cause petitions, because the 10th section of the Act directed that every petition presented under its authority "shall be heard as causes are now heard before the Lord Chancellor;" and also that the same section conferred respectively upon petitions and affidavits under the Act the character of bills and other pleadings in plenary suits. Mr. Smith also referred to a written communication from one of the authorised Reporters in the Court of Chancery in England to Mr. J. F. Reilly of the Outer Bar in reply to an inquiry as to the practice in England with respect to the hearing of claims filed under Lord Cottenham's New Rules, which communication stated that the writer had consulted several members of the English Bar on the point, and the universal opinion seemed to be that it would be contrary to forensic etiquette in England for a Queen's Counsel alone to hold a brief in a claim; and that in a recent case Mr. Bethell of the Inner Bar, in open Court, threw up his brief when he found that he had not a junior with him; and on that occasion Mr. Stuart, also of the Inner Bar, expressed his concurrence in the course pursued by Mr. Bethell; that claims were

considered as pleadings, and that the senior had a clear right to the assistance of a junior; that the writer had also consulted one of the Registrars and a gentleman connected with the record and writ clerk's department, who both coincided in saying that the Taxing-master in the case of claims allowed the costs of two Counsel.

**The LORD CHANCELLOR.**

I apprehend that this is a matter which I must leave to the Bar itself. I do not think that I am called upon to lay down any rule on the subject. Undoubtedly it has been the established practice in Courts of Law, and also in Courts of Equity, that pleadings should be opened by junior Counsel. I think that I ought to leave the settlement of this question entirely to the good feeling of the Bar. I have no doubt that it would be very beneficial both to the Court and to the suitors that juniors should be employed in such cases. One Counsel may be absent, and, even though not so, yet in cases presenting a complicated state of facts or otherwise of importance, the presence of a junior may be most useful. However, as I have already said, I do not think that it falls within my province to make any order on the subject. I leave it to the Bar to adopt any course upon it which they please.

The Right Honorable *Richard Wilson Greene*, being the senior Queen's Counsel present, said that he would not hold a brief in any cases in which a junior Counsel was not employed, and that all the members of the Inner Bar then present had, as he believed, come to the same determination.

Several eminent members of the Inner Bar were in Court and unanimously signified their assent to the statement of Mr. *Greene*.

Mr. *George* said that the petitioner's solicitor had asked him whether it would be necessary to retain junior Counsel, but that he (Mr. G.) mentioned what had passed on a previous occasion, when an objection, similar to that raised by Mr. *Smith*, was made on behalf of the Outer Bar, but was overruled by his Lordship. That even now if the Court would allow the present case to stand over, the solicitor was most willing to send a brief to junior Counsel.

**The LORD CHANCELLOR.**

Under the circumstances I think that it will be better to dispose of this case at once.

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### GARDINER v. BLESINTON.

May 6.  
July 13.

(*In the Rolls.*)

A being entitled to the benefit of certain articles of agreement entered into by the owners of lands situated in Ireland to execute to him a mortgage thereof for £42,000, by a deed executed in 1840, reciting the articles, assigned that sum and all the securities for its payment to trustees upon certain trusts. By a deed executed in England in 1842, also reciting the articles, A, for valuable consideration, assigned the same sum of £42,000, with all the securities for its payment, to M by way of mortgage. The deed of 1842 was registered previously to that of 1840. The memorial of the deed of 1842 described the lands on which the £42,000 was charged in the same manner as they were described in that deed itself; but neither the deed or memorial mentioned the names of the baronies or parishes in which the lands were situated.

*Sensible*—That the deed of 1842 would have been properly the subject of registry if the memorial had stated the names of the baronies and parishes. *Held*—That in consequence of the omission from the memorial of the names of the baronies and parishes, the deed of 1842 was not formally registered, and therefore had not gained priority over the deed of 1840.

*Malcolm v. Charlesworth* (1 Keen) observed upon.

the interest thereon to the said trustees, and all securities then subsisting or thereafter to be given for said sum, and all his interest under said agreement, so far as respected said sum of £42,000, and the interest thereof, and the securities for the same, to hold to the said trustees as fully as Count D'Orsay would have held the same, if the said indenture of the 8th of February 1840 had not been made. The deed then contained a power of attorney to the trustees to receive the £42,000, and a covenant for further assurance.

That deed was not registered until the 8th of April 1842, subsequently to the registration of the deed hereinafter next mentioned.

On the 22nd of January 1842, a deed was made and executed between the Count D'Orsay of the first part, Francis Mountjoy Martyn of the second part, and Charles Cecil Martyn of the third part.

This deed was registered on the 24th of February 1842, and the memorial of it recited the marriage settlement of Count and Countess D'Orsay of the 2nd of November 1827.\* It further recited the will of Charles John late Earl of Blesinton, dated the 31st of August 1823, and a devise therein to his daughter Lady Harriet Gardiner of "all his estates in the county and city of Dublin," subject to certain charges, provided she married the said Count D'Orsay, and a devise in the said will to Charles John Gardiner of "all his estates in the county of Tyrone," subject as therein mentioned, and also of the reversion of the Dublin estates in case of failure of male issue of his daughter. After some further recitals, which are not material, the memorial recited that the estates of the testator in the county and city of Dublin consisted of a lordship, advowson, messuages and hereditaments, to which he was entitled for an estate in fee-simple, and of messuages, estates and tenements, to which he was entitled by virtue of leases for lives renewable for ever, and by virtue of leases for years; and that the estates of the testator in the county of Tyrone consisted of manors, lands and other hereditaments, to which he was entitled for an estate in fee-simple, and of the manor

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\* See this settlement and some of the other documents referred to in this case in *Rochard v. Fulton* (1 Jo. & Let. 413; S. C. 7 Ir. Eq. Rep. 131).

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of Mountjoy, to which he was entitled by lease for a term of years; that the testator was also entitled to estates in the city and county of the city of Kilkenny, which were not devised by his will, and which had descended to his said daughter, who had married Count D'Orsay. It further recited that there was no issue of the marriage, and that in the year 1831 they had separated and had since lived apart. It also recited the proceedings in the suit of *Gardiner v. Blesinton*, and the said articles of agreement of the 16th of February 1838, and that Count D'Orsay was indebted to the said Francis Mountjoy Martyn by bond in the sum of £10,000, which bond bore date on the 31st of October 1838; and that upon the execution of the said bond it had been expressly agreed that Count D'Orsay should execute a good and valid charge on the said sum of £42,000 for the better securing the payment of the said sum of £10,000 and interest; and it was witnessed that the Count D'Orsay granted and assigned unto the said Francis Mountjoy Martyn, his executors, &c., the said sum of £42,000 agreed to be raised by the sale or mortgage of the estates of the said Charles John Earl of Blesinton, and all the interest due thereon, and all the moneys, &c., which the said Count D'Orsay, his executors, &c., then was or thereafter might become entitled to render; and by virtue of the said agreement of the 16th of February 1838, or otherwise however in respect of the said sum of £42,000, and all the right, title and interest of the said Count D'Orsay, into or out of or upon the said moneys and premises by the said indenture assigned, and all and every the securities for the same, to have, hold, receive and take all and every the said sum of £42,000, and the interest thereon, and the moneys, interests, rents, accumulations and premises, by the said indenture intended to be assigned, to the said Francis Mountjoy Martyn, his executors, administrators and assigns, subject to redemption.

The deed was executed in England, and the memorial followed the description in the deed.

By an order bearing date the 30th of June 1846, and other orders, it was referred to the Master to take an account of all the debts, charges and incumbrances affecting the several estates in the private Act of Parliament (9 Vic. c. 1) mentioned (having regard to

the trusts of the memorandum of agreement of the 16th of February 1838), and the particular charges and incumbrances affecting each of said estates respectively, and the priorities thereof respectively, and the funds applicable to the payment thereof, and to allocate the said funds, &c.

The Master by his report, made on the 24th of April 1850, found the several sums due to Robert Hume and James Russell under the deed of 1840, and that the same were the fifth charge on the funds payable under the memorandum of agreement of the 16th of February 1838, and that the demand of Francis Mountjoy Martyn was the sixth charge on the said funds.

F. M. Martyn took two objections to the report—first, that the Master should not have so found; but from the facts and evidence laid before him, should have found that the demands of Robert Hume and James Russell were subsequent to his demand; secondly, that the Master found that the sum due to F. M. Martyn was the sixth charge on the said funds, whereas the Master, from the facts and evidence laid before him, should not have so reported, but should have found that it was the fifth charge on the said funds. The Master having overruled the objections—

Mr. Berwick, for Mountjoy Martyn, moved on the objections to vary the report. *Argument.*

Mr. Brewster and Mr. Pilkington, for Hume and Russell, the trustees of the deed of 1840, contended—first, that the deeds were not within the Registry Acts: *Malcolm v. Charlesworth* (a); secondly, that the provisions of the several Registry Acts had not been complied with, and therefore the registration of the deed of 1842 was ineffectual to give it priority.

The several statutes referred to are commented on in the judgment.

Mr. Hickie, in reply, argued that the deeds were capable of registry under the Irish statute (6 Anne, c. 2, s. 4): *Drew v. Lord*

(a) 1 Kee. 63.

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*Norbury* (a), and that the requirements of the Registry Acts had been sufficiently complied with by the memorial to make the registration of it valid : *Dillon v. Costello* (b) ; *Gubbins v. Gubbins* (c).

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The MASTER OF THE ROLLS, after stating the order of the 30th of June 1846, and the Master's report, said :—

A motion has been made on the part of Francis Mountjoy Martyn, Esq., to vary the report, founded on two objections taken to the draft report. The objections were overruled by the Master. The objections have been drawn up in a very inconvenient form. It is right that a general objection should be taken to a report in addition to objections specially pointing out the questions intended to be raised, as such general objection may prevent the Court being embarrassed by any technical difficulty arising from the frame of the special objections. But the attention of the Master should be called by objections to the points upon which the report is complained of, and the Court should be enabled from reading the objections to understand the precise grounds upon which it is contended that the report is erroneous. It is quite impossible from reading these objections to understand what were the points raised before the Master. I wish, however, to be understood that I do not desire to encourage a course sometimes adopted, and even more objectionable, of filing a vast number of objections to the report, raising the same points.

The Master has found that the claims of Robert Hume and James Russell were the fifth charge on the funds coming to or payable to the said Alfred Count D'Orsay, under a certain memorandum of agreement of the 16th of February 1838.—[His Honor stated the memorandum of agreement of the 16th of February 1838, the deed of the 8th of February 1840, and the deed and memorial of the 22nd of January 1842, as above abstracted.]

Counsel for Mr. Mountjoy Martyn, in support of the objection to the report, insists that the deed of the 22nd of January 1842 having been registered on the 24th of February 1842, and the deed of

(a) 3 Jo. & Lat. 267; S. C. 9 Ir. Eq. Rep. 171.

(b) 1 Jo. 410.

(c) 1 Dr. & W. 160.

the 8th of February 1840 not having been registered until the 8th of April 1842, the deed of the 22nd of January 1842 has priority by virtue of the Statutes for the Registration of Deeds, and that the Master's report is erroneous in having found that the deed of 1840 has priority over the deed of 1842.

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*Judgment.*

It has been contended by Counsel on the part of Mr. Robert Hume and Mr. James Russell—*first*, that the deed of 1842 does not fall within the said statutes, and that therefore no priority was gained by registration; and *secondly*, they have contended, that even if the said deed fell within those statutes, the provisions of the Acts were not complied with, and that the registration therefore was void and ineffectual to give priority.

Upon the first point the case of *Malcolm v. Charlesworth* (*a*) has been relied on. In that case it was decided that an assignment of a legacy charged upon land is an assignment of money only, and does not affect the land within the meaning of the Acts for the Registry of Deeds in Yorkshire; and that the registration of such an assignment did not postpone a prior unregistered assignment of the same legacy.

I may observe that no question has been argued before me as to the effect of the contract of Countess D'Orsay with her husband, by the articles of the 16th of February 1838. Both parties who have appeared on this motion claim the £42,000 under the deeds of 1840 and 1842.

It is not necessary therefore that I should offer any opinion as to the effect of that contract, or upon the construction of the 6th section of the private Act of Parliament (9 Vic. c. 1). It has been taken for granted upon both sides that the contract was, by the statute, rendered binding on the Countess.

The covenant in this contract of the 16th of February 1838 was to execute to Count D'Orsay a good and valid mortgage of the estates and property of the late Earl of Blesinton, to secure the sum of £42,000, subject as in the said agreement mentioned.

In the case of *Drew v. Lord Norbury* (*b*) the present Lord Chief Justice stated:—"I quite concur with Baron Pennefather that the

(*a*) 1 Keen, 63.      (*b*) 3 J. & L. 300; S. C. 9 Ir. Eq. Rep. 186.

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covenant for renewal was specific in its nature, conveying, or stipulating to convey, that which in this Court is equivalent to an equitable estate, and giving to the plaintiff a right to call for a conveyance of the legal estate pursuant to the terms of the covenant." In the same case, p. 302(a), Sir Edward Sugden observed "It is said that an equitable contract by force of registry obtains legal validity;" and after advert ing to Lord Redesdale's decision in *Underwood v. Courtown*, he adds:—"I apprehend, however, that the Act of Parliament (*i. e.* the Act for the Registry of Deeds) does not convert an equitable into a legal estate; that would be to confound the nature of those two estates; but it so impresses the title with the liability to give effect to the equitable estate, that the person who obtains the legal estate is bound to support the equitable title, and to clothe it with the legal estate; and accordingly, in the case of *Bushell v. Bushell*, the decree was for the specific performance of the articles of agreement, not that the articles had passed the legal estate, but that they had so bound the title in the hands of the owner of the legal estate, that he was compelled to give effect to them."

Sir E. Sugden then advert to the distinction between the Registry Acts here and in England.

I think it is not at all clear that an assignment of an equitable contract for a mortgage is under the Acts for the Registration of Deeds in this country to be considered as a mere assignment of money.

The case of *Malcolm v. Charlesworth* is very different from the present. The opinion, however, which I have formed on the second question which arises, renders it unnecessary that I should decide the first question.

The second question is, whether the registration of the deed of 1842 is ineffectual to give it priority over the deed of 1840, in consequence of the non-compliance with the provisions of the Statutes for the Registration of Deeds?

I have already stated at length the memorial of the registry of the deed of 1842. The memorial does not describe the lands in Tyrone, or state the denominations, except the manor of Mountjoy,

(a) 9 Ir. Eq. Rep. 188.

which the said Earl of Blesinton was entitled to for a term of years, which has expired; nor does the memorial state the barony in which the manor of Mountjoy, or any of the lands in the county of Tyrone are situate, nor does it describe in any manner the situation of the houses in the cities of Dublin or Kilkenny, either by stating the parish or street or other locality where same are situate. Counsel on the part of Francis Mountjoy Martin, Esq., insists—first, that under the Statutes for the Registration of Deeds it is not necessary that the memorial of deeds should state the denomination of the lands, or any descriptions thereof, or the barony wherein they are situate, or, where the premises are in a city, the parish, street, or other locality where they are situate. If this argument is well founded it is equally unnecessary to specify the county or city where the lands or premises are situate; and a deed and memorial not stating the denomination of the lands and premises, but merely conveying all the lands of the grantor in Ireland, ought, according to the argument, to be registered by the officer in the office for registering deeds, under the provisions of the statutes, and would by such registry gain priority.

The earliest Act is the 6 Anne c. 2. The 4th section of that Act gives priority to the deed or conveyance, “a memorial whereof shall be duly registered according to the rules and directions in this Act prescribed.”

The 5th section declares that the deed not registered shall be fraudulent and void as against the deed, “a memorial whereof shall be registered in pursuance of this Act.”

The 6th and 7th sections then contain the provisions as to the mode of registration, and the 7th section enacts that every memorial of a deed shall contain, amongst other matters, “The names of all the counties, baronies, cities, towns corporate, parishes, townships, hamlets, villages, precincts within this kingdom where any such honors, manors, lands, tenements or hereditaments are lying and being, that are given, granted, conveyed, devised, or any way affected, or charged by any deed, conveyance, &c., *in such manner as the same are expressed or mentioned in such deed, conveyance,*” &c.; and the latter part of the section contains directions

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to the Registrar to keep an alphabetical calendar, which direction led to the keeping, under that Act, of an index to lands, and also of an index of the names of the grantors.

**BLESINTON.** There is no reported case which establishes satisfactorily what the construction was which was put upon the statute of *Anne*, in relation to the question now under consideration. It is, however, said to have been decided by Lord Manners, in the case of *Gubbins v. Gubbins* (a); *Molesworth on Registration of Deeds*, pp. 10, 34; that a deed, by which the grantor covenanted to settle after acquired lands, and which deed was registered (the memorial setting out such covenant), had priority over a subsequent deed conveying such lands, after they had been acquired, the latter deed being also registered.

The case appears to have been heard by Lord Manners upon report unexcepted to, and it does not appear from the report in 1 *Drury and Walsh* that the question was argued.

The case is stated in the report to have been heard on the 14th of June 1825, and I am informed by the Registrar that on reference to the Registrar's book, it appears that several causes were heard on that day, and amongst others *Gubbins v. Gubbins*, which was heard on report and merits, no exceptions having been taken to the report: that the decree was in pursuance of the report, and that no question is stated on the Registrar's book to have been discussed, save the costs of the several parties, and a search having been made from 1804 to 1830, as to any question having been raised in said cause, no further trace can be found of the case.

It was stated by Counsel in the argument of the case of *Barlow v. Smyth* (b) that Lord Manners decided in *Dillon v. Costeloe* that a grant of all the grantor's lands in the county of A, with a corresponding memorial, was within the terms of the statute of *Anne*. The date of that alleged decision is not stated.

There is no doubt, however, that it was generally supposed by the Profession that Lord Manners had decided the question in the case of *Gubbins v. Gubbins*, as stated in Mr. *Molesworth's* work;

(a) 1 Dru. &amp; Wal. 160.

(b) 1 Jo. 410.

and I have found a manuscript note that it was so decided. The language of the 7th section of the statute of *Anne*, which required the memorial to describe the lands "in such manner as the same are expressed or mentioned in such deed or conveyance," may have warranted a decision that it would not be necessary to describe the lands more particularly in the memorial than in the deed. The result, however, of such a construction of the statute of *Anne*, was to render the Act of little avail, in preventing fraudulent or secret conveyances.

In such a case as *Gubbins v. Gubbins* the index to lands would furnish no information whatever. It was not usual to direct searches against grantors, except from the time of their acquiring the estate; and a purchaser would thus, in such a case as *Gubbins v. Gubbins*, and other cases which might be mentioned, have received no information whatever, either from a search in the index of lands or in the index of names, for the deed, which, according to that decision, would bind the lands.

The consequences which would have followed from the decision, or supposed decision, in *Gubbins v. Gubbins*, probably led to the passing of the 10th section of the 9 G. 4, c. 57, by which it was enacted, "That it should not be lawful for the Registrar, &c., to grant any certificate of the registry of any memorial registered, at any time after the expiration of one calendar month next after the passing of the said Act, unless such memorial should specify the barony or parish, or both, wherein any lands or tenements intended to be affected by such registry were situate."

That Act was repealed by the 2 & 3 W. 4, c. 87; and the question is, whether, under the latter Act, the registry of a deed can be effectual to give it priority over a deed prior in date, where the names of the lands and premises are not mentioned, and where there is no description of their situation, save that they were situate in the county of Tyrone, and the cities of Dublin and Kilkenny? No question arises as to the manor of Mountjoy, which was held for a term of years which has expired.

By the 12th section of the statute of the 2 & 3 W. 4, c. 87, it is directed that an "abstract book" should be kept in the office for VOL. 1.

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the registry of deeds, which is to contain a short statement of the effect of the instrument stated in the memorial, and is to contain amongst other matters "the name and description of the premises and the county, barony and parish wherein the premises are situate." The form in which such "abstract book" is to be kept is stated in schedule D to the Act.

One of the columns of such schedule is headed "name, description and situation of the premises," and the column is, by the directions in the schedule, to be filled up with a description of the denominations of the lands, and the parish or barony and county wherein they are situate.

By the 17th section of the said Act, an "index of lands" is to be kept, and in case of lands in counties, the barony is to be stated, and in case of cities, the parish or street is to be stated. I may observe, that I have obtained, in this case, copies of the entries in the abstract book and index of lands, and neither the one or the other comply with the directions of the statute, it being of course impossible they could do so, from the frame of the memorial.

The 29th section of the Act of W. 4, after reciting "that great difficulties had occasionally been experienced, in the said Registrar's office, from a want of a sufficiently full description being inserted in the memorial, of the place in which the lands are situated, and that it was fitting that, in future memorials, such omissions should not be left unsupplied, it was enacted, that in every memorial of any deed or instrument, dated after the 31st of December 1832, brought into the said office to be registered, there should be specified the county and barony, or the town or county of a city and parish, or the town and parish, in which the lands, and every of them, to be affected by registering such memorial, are, by such deed or instrument, stated to be situated, and where the lands lie in two or more counties or baronies, or parishes or streets, or partly in one barony, parish or street, and partly in another, the same shall be distinctly stated in the memorial from the deed."

The section then authorises the party registering a deed, which shall contain a plan of the lands, &c., to annex a copy of the plan to the memorial; but this is only to be done "if it be the pleasure of

the party requiring the registration of such memorial;" and the section then concludes thus:—"And moreover that every memorial, brought into the said office to be registered, shall be there compared with the instrument of which it purports to be a memorial. And if the several particulars, required by law to be in the memorial, shall be contained therein, or such of the particulars by this Act required to be set forth in the abstract book hereinbefore mentioned, as shall be contained therein, shall be found to be truly stated from the instrument, then the memorial shall be registered, *but not otherwise.*" The latter part of the 29th section is obscurely worded.

Any difficulty, however, which might otherwise arise upon the construction of that section appears to be removed by the 30th section. The 30th section enacts, "that where the deed shall bear date on or before the 31st of December 1832, and such deed shall not state the barony or parish in which the land, &c., is situated, the fact being stated and verified in the affidavit of the execution of the memorial, in what barony or parish the lands, &c., are situate, such memorial shall in like manner be registered." From that latter section I think it is to be inferred that as to all deeds which bear date subsequent to the 31st of December 1832, if the barony or parish is not stated in the deed, and in the memorial, the memorial ought not to be registered; and I am of opinion that the registration of such an instrument is of no effect, and gives no priority.

Counsel for Mr. Mountjoy Martyn has contended that conveyances under the former Bankrupt and Insolvent Acts did not contain any description of the lands or premises, and that they were capable of and required registration.

As to conveyances under the Bankrupt Statutes, the 11 & 12 G. 3, c. 8, s. 3, which was the first statute which introduced the Bankrupt Law into Ireland, required the conveyances of the bankrupt's lands, executed by the Commissioners, to be enrolled.

I apprehend that a deed subsequently executed by the bankrupt, and registered under the Act for the Registration of Deeds, could have had no operation whatever to defeat an estate vested in the assignees, by virtue of the execution of the statutable power given to the Commissioners of Bankruptcy to convey the estates of the bankrupt by deed enrolled.

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The 1 & 2 W. 4, c. 56, s. 27, authorised the registry of the appointment of assignees, under a commission of bankruptcy, in the office for the registration of deeds, and such registration of the appointment of assignees was to be a substitute for the enrolment or registration of the deed executed by the Commissioners of Bankruptcy; and the section concludes thus:—"And the title of any purchaser of any such property, as last aforesaid, for valuable consideration, without notice of the bankruptcy, who shall have duly registered, enrolled or recorded his purchase deed, previous to the registry thereby directed, should not be invalidated by reason of such appointment of an assignee or assignees as aforesaid, or the vesting of such property, in him or them, consequent thereupon, unless the certificate of such appointment shall be registered, as aforesaid, within two months from the date of such appointment."

The 6 & 7 W. 4, c. 14, s. 78, enacted that a certificate of the appointment or choice of assignees, under the hand and seal of the Commissioner of Bankrupts, should be entered of record in the office for the enrolment of matters relating to bankruptcy herein-after mentioned, and that the same, when so enrolled, should be effectual, to all intents and purposes, as if a deed or deeds of assignment or conveyance, of the personal and real estates of such bankrupt, had been executed to the said assignees, and duly registered or enrolled. Those enactments do not appear to me to show that a conveyance under the 11 & 12 G. 3, c. 8, required to be registered. I think a contrary inference is to be drawn from the statutes. The effect, however, of the 78th section of the 6 & 7 W. 4, has been to render a purchaser insecure, as he may not be aware whether the vendor may or may not have been a trader subject to the Bankrupt Laws.

In order to provide a remedy for this defect in the law, the bill now before Parliament for the registration of deeds contains clauses (a), the object of which is to have a book opened in the office for the registry of deeds, containing entries of the names of bankrupts and insolvents.

(a) 20th, 21st, 22nd, 23rd sections of Bill to Amend the Laws for the Registration of Assurances of Lands in Ireland, printed 7th February 1850.

With respect to the argument in relation to conveyances by insolvent debtors under the Acts in force prior to the 3 & 4 Vic. c. 107, there is more difficulty; such conveyances were no doubt, according to the decisions, voluntary acts, and the assignment in use contained no description of the lands or premises assigned. Whether such an assignment under the Insolvent Act (1 & 2 G. 4, c. 59) was capable of being registered under the Acts for the Registration of Deeds, was argued before Sir E. Sugden, in the case of *Battersby v. Rockfort* (a), but was not decided. It is not necessary that I should decide, as to the effect of a conveyance to the provisional assignee under that statute, or whether it required to be registered, or whether a deed executed by the insolvent after his discharge could have acquired priority by registration over the assignment to the provisional assignee. Two statutes are referred to in the second vol. of *Sir Edward Sugden's work on Vendors and Purchasers*, which would deserve consideration if that question should arise. It is sufficient that I should state my opinion that, in this case, the registration of the deed of 1842 was ineffectual, under the sections of the Statute for the Registration of Deeds, to which I have referred, to give it priority over the deed of 1840.

I may observe that by the Insolvent Act (3 & 4 Vic. c. 107, s. 34), the vesting order is to be registered in the office for the registration of deeds; and, by the bill now before Parliament, further provisions have been introduced, to remedy the difficulty which has been felt, as to the construction of the Statutes for the Registration of Deeds, in case of the bankruptcy of a grantor, or his discharge as an insolvent debtor.

An argument has also been urged by Mr. Mountjoy Martyn's Counsel that the deed of 1842 was executed in England, and that the case is to be decided upon the construction of the 3 G. 4, c. 116, and not upon the Act of the 2 & 3 W. 4. The earliest statute which related to the registry of deeds executed in Great Britain was the 8 Anne, c. 10; and that Act, as well as the 3 G. 4, dispensed with the production of the original deed to the Registrar; and although the latter part of the 29th section of the 2 & 3 W. 4, c. 87, contem-

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(a) 2 J. & L. 431.

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plates the production of the original instrument to the Registrar, yet the language of the Act is general, and includes all memorials; and I do not think that it was the intention of the Legislature that the forms of memorials of deeds executed in Great Britain were to be different from the forms of memorials of deeds executed in Ireland. Upon the argument on this case, during the last Sittings, it was contended that Messrs. Hume and Russell had notice, prior to the execution of their deed, of the agreement alleged to have been entered into by Count D'Orsay with Mr. Mountjoy Martyn, in 1838. I then stated that I was of opinion that there was no sufficient evidence to affect Mr. Hume and Mr. Russell with notice of any such agreement, and I am still of the same opinion. The objections must therefore be overruled and the motion refused, with costs.

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Chancery.

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(*Chancery.*)

Dec. 7, 13.

THIS case now came on to be heard by way of appeal from the order of his Honour the MASTER OF THE ROLLS. In addition to the facts reported *supra*, p. 63, an affidavit by Mr. Mountjoy Martyn's solicitor was produced, which stated that with a view to ascertain approximately the number of deeds registered in the year 1842, of which the memorials do not contain the names of the parish or barony of the lands whereof the deeds were conversant, he made a diligent search in Nos. 1 and 2 of the abstract books for the year 1842, of which there were altogether twenty-five. That in No. 1 there appeared to be sixty-five deeds registered not containing either the barony or the parish; that in No. 2 there were fifty-eight such deeds, and that taking the average from these data, there were upwards of 1500 deeds registered in 1842 not containing either parish or barony. That similar searches and averages gave the number of deeds registered in 1845 not containing the names of the barony or parish, as 1500, and in the year 1849 as 1450. That in addition to the deeds registered in the years 1842, 1845 and 1849, omitting the names of the parish and the barony, there were many deeds registered, in those years, which, although containing the barony, omitted the parish, and *vice versa*.

A, being entitled to the benefit of certain articles of agreement entered into by the owners of lands situated in Ireland to execute to him a mortgage thereof for £42,000, by a deed executed in 1840, reciting the articles, assigned that sum, with all the securities for its payment, to trustees upon certain trusts. By a deed executed in England in 1842, also reciting the articles, A, for valuable consideration, assigned the same sum of £42,000, with all the securities for its payment, to M. by way of mortgage. The deed of 1842 was registered previously to that of 1840.

The memo-

Mr. Christian and Mr. Hickey, for Mr. Mountjoy Martyn.

The deed of the 22nd of January 1842 falls within the scope of

rial of the deed of 1842 described the lands, on which the £42,000 was charged, in the same manner as they were described in that deed itself; but neither the deed or memorial mentioned the names of the baronies or parishes in which the lands were situated. *Held*, that the deed of 1842 was properly the subject of registry.

*Held also*, reversing the decision below, that, notwithstanding the omission from the memorial of the names of the baronies and parishes, the deed of 1842 was properly registered, and therefore had gained priority over the deed of 1840.

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the Registry Acts, and is not governed by *Malcolm v. Charlesworth* (*a*), which was the case of the assignment of a legacy merely. Mr. Martyn is in the position of an equitable mortgagee and also of a vendor retaining his lien. The statute 6 *Anne*, c. 2, is very comprehensive in its range, as appears from the preamble and from the 3rd section, which directs the registry of all deeds and conveyances, "whereby any honours, manors, lands, &c., may be anywise affected." That mortgages are within it, is evident from the statute 8 *G. 1*, c. 2, s. 5. This point is ruled by *Rochard v. Fulton* (*b*); *Wilmot v. Pike* (*c*); *Bushell v. Bushell* (*d*); *Drew v. Lord Norbury* (*e*); *Warburton v. Ivis* (*f*); *Jones v. Jones* (*g*).

The second question, viz., as to whether the necessary formalities have been observed in the registration of the deed, is not now open to the other side, because the Master has by his report found that the deed was duly registered.

At all events the objection that the memorial does not contain a statement of the barony or parish in which the lands are situated, cannot be sustained. It is manifest that the statute 6 *Anne*, c. 2, does not enjoin any greater particularity of description than that supplied by the deed itself. The 4th, 5th and 7th sections of that Act all take the distinction between lands contained or comprised, and lands expressed in the deed. The decisions on this Act show what latitude of description is allowed: *Gubbins v. Gubbins* (*h*); *Dillon v. Costello* (*i*); *Rodger v. Tuckill* (*k*).

This deed having been executed in England, the registry of it falls within the statute 3 *G. 4*, c. 116, which dispenses with the necessity of producing the deed to the Registrar, but does not in any other respect infringe upon the provisions of the statute of *Anne*. The 10th section of the statute 9 *G. 4*, c. 57, prohibiting the Registrar from granting a certificate of registry of any memorial

(*a*) 1 Kee. 63.                    (*b*) 1 Jo. & Lat. 413; S. C. 7 Ir. Eq. Rep. 131.

(*c*) 9 Jurist, 842.                    (*d*) 1 Sch. & Lef. 90.

(*e*) 3 Jo. & Lat. 267; S. C. 9 Ir. Eq. Rep. 171, 524.

(*f*) 6 Bls. N. S. 1; S. C. 2 Dow. & Clark. 480.

(*g*) 8 Sim. 633.                    (*h*) 1 Drn. & Wal. 160, n.

(*i*) Cited 1 Jo. Exch. Rep. 410.

(*k*) Molesworth on Registration, 35.

unless it specified the barony or parish, or both, being deemed inconvenient by the Legislature, has been repealed by the statute 2 & 3 W. 4, c. 87. That statute was passed, not for the purpose of interfering with the validity of the registration of deeds, or with their priority, but for the purpose of creating increased facilities of reference in the official department.—[Counsel here commented at length on the 29th and 30th sections of the statute 2 & 3 W. 4, c. 87.]—There are not any negative words in the 30th section of the statute. In the absence of such words a statute will be deemed directory only, as appears from the observations of Taunton, J., in *Pearce v. Morris* (*a*). Where such words do occur they are limited within strict bounds: *The Queen v. The Inhabitants of Fordham* (*b*). It is worthy of note that in the form of requisition given by the 21st section there is no mention made of the barony or parish. How could a covenant, to charge future acquired property, be registered in the manner contended for? Such covenants may be registered: *Gubbins v. Gubbins* (*c*), and have been held good against the assignees of a covenantor who became an insolvent: *Hardey v. Green* (*d*). The assignment to the provisional assignee of an insolvent may and ought to be registered, although it is general in its terms, and specifies no particular lands: *Battersby v. Rockfort* (*e*). The practice in the registry office has been to admit the registration memorials, which contain neither the names of the barony or parish. The Court will not shut its eyes to this fact, nor to the formidable consequences of a decision which would invalidate the registry of some thousands of deeds. In *Barlow v. Smythe* (*f*), where it was held that the memorial of the assignment of a judgment was not vitiated by omitting to state the sum due on the judgment, Joy, C. B., observes:—“ There is no doubt that very many judgments have been assigned by memorials in that form; and with all due respect for the opinions of the Judges of the Courts of King’s Bench and Common Pleas, we are of opinion that we should do a very danger-

(*a*) 2 Ad. & E. 96.

(*b*) 11 Ad. & E. 73.

(*c*) *Ubi sup.*

(*d*) 12 Beav. 182.

(*e*) 2 Jo. & Lat. 431.

(*f*) 1 Jo. Exch. Rep. 407, 412.

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ous thing were we to hold that such judgments had not been duly assigned. We think that the contemporaneous construction put upon the Act is to be respected, and that when such construction has been recognised for many years, it would be most dangerous to upset it. We therefore are of opinion that such memorials are not invalid. It is with much regret that we differ from the other Courts; and if the matter were *res integra*, and if recently after the enactment of the statute the form contended for, and no other, had been adopted, we might have construed the statute accordingly. But the other Courts never inquired into the practice, the *contemporanea expositio quae est optima*, as we have done." Even supposing the construction put upon the Registry Acts by Lord Manners, by the Profession, and in the registry office, originally to have been erroneous, the case would be one for the application of the maxim, "*communis error facit jus.*"

Mr. Brewster and Mr. Pilkington, for Messrs. Hume and Russell.

As to the first question. If *Malcolm v. Charlesworth* (a) be law, a legacy charged upon lands is not within the Registry Acts. What difference is there between a legacy charged upon lands and the charge here in favour of Mr. Mountjoy Martyn? The one is as much a charge as the other.

Secondly. We are not precluded by the report from discussing the validity of the registration.—[The LORD CHANCELLOR. The Master having decided the matter upon the ground that the case did not fall within the Registry Acts, and having accordingly discarded altogether from his view the question as to whether or not the necessary formalities had been observed, I shall not hold you concluded by the report from arguing that they have not.]—The 12th section of the statute 2 & 3 W. 4, c. 87, contemplates the necessity of inserting the county, barony and parish in the abstract book. So does the 14th section with regard to the alphabetical indexes to be prepared thereunder; and the 17th section does the same as to the index of lands. The argument founded upon the

(a) 1 Keen, 63.

omission of the barony or parish in the form of registration, given by the 21st section, is counterpoised by the 22nd section, which allows variations in the form of the requisition with reference *inter alia* to the baronies and parishes. The preamble of the 29th section is of itself almost conclusive of the question. That section, after enacting that the county and barony, or town and parish, are to be specified in the memorial, directs that if the memorial, on comparison with the deed, be found to contain the particulars required by law or by the Act, it shall be registered, "but not otherwise." The absolute necessity of the specification of the barony and parish is manifested by the 30th section, which, with reference to deeds, bearing date prior to or upon the 31st of December 1832, and with reference to wills of any date, allows the omission of the barony or parish in such deed or will to be supplied for the purpose of registry by affidavit. What would be the meaning of this section if it were optional to insert the barony and parish in the memorial? The intention of the Act is clear, and the important consequences of a decision holding the insertion of these particulars essential to valid registry cannot be permitted to control the construction of the Act: *The King v. Poor-law Commissioners* (*a*); *The King v. The Inhabitants of Great Bolton* (*b*), *per* Tenterden, C. J.; *Mozer v. Newman* (*c*). The statute 3 G. 4, c. 116, must be looked upon as repealed by the statute 2 & 3 W. 4, c. 87.

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#### The LORD CHANCELLOR.

I shall consider this case for a few days. It may perhaps be a proper one for the opinion of a Court of Law.

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#### The LORD CHANCELLOR.

This case comes before me on motion by way of appeal from the decision of his Honour the Master of the Rolls. He affirmed the report of Master Litton as to the charge of Mr. Mountjoy Martyn. The Master reported it to be the fifth charge upon the lands. It is

*Dec. 18.  
 Judgment.*

(*a*) 6 Ad. & El. 1.

(*b*) 8 B. & C. 71.

(*c*) 6 Bing. 561.

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contended that the report is wrong, inasmuch as this charge, it is said, should have priority over that of Messrs. Hume and Russell, who derive under an instrument executed by Count D'Orsay, prior in point of date, but puisne in point of registry, to that under which Mr. Martyn derives, supposing it to have been properly registered. Upon the ground that the property, the subject-matter of Mr. Martyn's deed, was not of a nature which brought the case within the Registry Statutes, the Master thought that the deeds must rank according to their dates. The Master of the Rolls differed from the Master as to the character of the property, being of opinion that it was properly the subject of registry, and that, if there were nothing else in the case, the report was erroneous; but passing by that question, he thought that, even admitting that the property were capable of registry, the deed was not registered in such a manner as to bring it within the protection of the Registry Acts, being of opinion that the omission to state in the memorial the names of the barony and parish in which the lands were situated, vitiates the registry and rendered it void.

I shall consider first the grounds on which the Master came to the conclusion that the property was not properly the subject of registry. I concur in the view taken by the Master of the Rolls on this question. Count D'Orsay's title to this particular property originated under the memorandum of agreement bearing date the 16th of February 1838.—[His Lordship here stated the substance of that agreement.]

Now under that instrument what was the position of Count D'Orsay? He was entitled to the benefit of an agreement by the recognised owners of the inheritance in the Dublin, Kilkenny and Tyrone estates to execute a valid mortgage of those estates to him for the payment, in ten years, of £42,000. In other words he had a clear equitable contract for a mortgage to that amount. A contract for a mortgage of the fee must, under the statutes, stand on the same footing as a contract for an absolute sale of the estates. In *Drew v. Lord Norbury* (a) Blackburne, C. J., says:—“I quite concur with Baron Pennefather that the covenant for renewal was

(a) 3 Jo. & Lat. 300, 302.

specific in its nature, conveying, or stipulating to convey, that which in this Court is equivalent to an equitable right or estate, and giving to the plaintiff a right to call for a conveyance of the legal estate pursuant to the terms of the covenant;" and Sir Edw. Sugden in the same case observes :—“I apprehend, however, that the Act of Parliament (6 Anne, c. 2) does not convert an equitable estate into a legal estate; that would be to confound the nature of those two estates; but it so impresses the title with the liability to give effect to the equitable estate, that the person who obtains the legal estate is bound to support the equitable estate and to clothe it with the legal estate.” I apprehend that this instrument gave to Count D’Orsay what in this Court is equivalent to an equitable right or estate, and a right to call for a conveyance of the legal estate. It therefore appears to me that this case cannot be likened to *Malcolm v. Charlesworth* (a), where it was held that assignments of a legacy charged upon lands, lying partly in the North Riding of Yorkshire, were not affected as to their priority by registration. The case of an equitable mortgage seems to me to stand upon totally different principles, and to be undistinguishable from any other contract for an estate. It has been frequently decided that a contract for the purchase of an estate is not only capable of registry, but that by force of registry it takes priority according thereto. If Count D’Orsay had an equitable estate in the lands, within the meaning of the expressions which I have quoted from Blackburne, C. J., and Sir Edward Sugden, in *Drew v. Lord Norbury*, he had an estate which he might convey to whomsoever he pleased. I cannot distinguish between an instrument giving that estate to him and an instrument executed by him, parting with that estate to another person. By conveyance he transfers to his grantee the same equitable interest which he himself had, and the right which he had to call for the legal estate. The grantee of Count D’Orsay might insist upon a conveyance of the legal estate in execution of the contract contained in the memorandum of agreement of the 16th of February 1838. In *Drew v. Lord Norbury* the opinions of the Lord Chief Justice, Baron Pennefather, and Sir Edward

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(a) 1 Keen, 63.

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Sugden, all proceed on the basis of the validity of the registration. The validity of the registry of equitable acts was established, or rather confirmed, by Lord Redesdale in *Bushell v. Bushell* (*a*), and it is now too late to question that doctrine. Considering the nature of the interest of Count D'Orsay, I find it was an estate as much as any other founded upon contract; and looking to the memorial of the deed, I find it conveyed not only the £42,000 to the grantee Martyn, but also the securities for it held by Count D'Orsay, one of which is the agreement to execute a valid legal mortgage. If therefore the case depended solely upon the first question, I could not affirm the decision of the Master.

The second question is one of greater importance; it is, supposing this deed to be capable of registry, has it been properly registered? The objection is that it does not describe the lands in any other way than as lying in certain specified counties, and it is contended, and the Master of the Rolls held, that as the memorial does not contain also the names of the baronies and parishes, it is a bad memorial, and the deed is not registered. In order to consider how far that position is correct, it is necessary to go back to the original Registry Act, that of the 6 Anne, c. 2. The 1st section establishes the office; the 3rd section enacts, that a memorial of all deeds and conveyances, and of all wills and devises in writing "whereby any honours, manors, lands, tenements or hereditaments within this kingdom may be anywise affected, may at the election of the party or parties concerned be registered in such manner as subsequently directed by the Act. The 4th section provides that every deed or conveyance whereof a memorial shall be registered according to the Act shall be deemed as good and effectual both at law and in equity according to the priority of time of registering such memorial concerning the honours, manors, &c., in such deed or conveyance mentioned or contained, according to the right, title and interest of the grantor against all and every other deed, conveyance or disposition of the honours, manors, lands, tenements or hereditaments comprised in any such memorial. The 5th section declares unregistered deeds fraudulent and void as against registered deeds, and as against creditors by judgment, recognizance, &c. The 6th section

(*a*) 1 Sch. & Lef. 90.

has reference to some of the formalities necessary for the preparation of the memorial. The 7th section *inter alia* enacts that every memorial of any deed, conveyance or will "shall express or mention the honours, manors, lands, tenements or hereditaments contained in such deed, conveyance or will, and the names of all the counties, baronies, cities, towns corporate, parishes, townships, hamlets, villages, precincts, within this kingdom, where any such honours, manors, lands, tenements or hereditaments are lying and being, that are given, granted, conveyed, devised, or any way affected, or charged by any deed, conveyance or will, in such manner as the same are expressed or mentioned in such deed, conveyance or will, or to the same effect." The 15th section provides for cases where more witnesses than one are necessary for perfecting a conveyance. Upon that Act I conceive this case to depend, because that Act contains the only section (the 4th) which at the time of registering this memorial was in force for regulating priorities *inter se*, except the sixth clause contained in the statute 3 G. 4, c. 116, with reference to the registry in Ireland of deeds executed in Great Britain, and which is similar to the 4th section of the statute 6 Anne c. 2. Would this be a good memorial under the statute of Anne, supposing that no other statute had been passed? I do not think that it was very strongly argued that it would not. And if we look to the decisions, which are not very numerous, and which concur with the practice in the office, they suffice to show that, in order to insure valid registration, it is not necessary that the deed should contain the names of the baronies and parishes, but that it is enough to insert in the memorial so much as is contained in the deed if the lands and tenements be specified in it, and there is nothing to show that the memorial should go beyond the four corners of the deed.

Accordingly in *Dillon v. Costello* (*a*), where a deed was executed by which the grantor conveyed all his lands "in the county of A," and the memorial was in the same words, Lord Manners held the memorial to be sufficient, although the townships, &c., were not specified. But the case of *Gubbins v. Gubbins* (*b*), also before Lord

(*a*) Referred to in 1 Jo. Exch. Rep. p. 410, and in Molesworth on Registration, p. 10.

(*b*) 1 Dru. & Wal. 160, n.

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Manners, goes still farther, for it decides that a registered deed will bind lands of which the grantor was not seized until subsequently to the execution and registry of the deed. There appears undoubtedly to be great difficulty in holding that an Act of Parliament providing for lands being affected by registry, "according to the right, title and interest of the person or persons conveying," should apply to cases where the party conveying had not any right, title or interest at the time. However, this decision of Lord Manners never has been questioned; and with reference to *Lord Dillon v. Costello*, I may say that I see nothing in the statute of Anne which would prevent the registry of a deed describing the lands as merely the lands of A (the grantor) in the county of B. Those decisions having so long ago received the authority of Lord Manners, and continued ever since unquestioned, must be now regarded as settled law.

The statute 2 & 3 W. 4, c. 87, is that relied upon as invalidating this memorial. It is, in the part bearing on this case, a curious piece of legislation, and raises more doubts than it can settle. It was the Act in force when this deed was registered, which, however, having been executed in Great Britain, was perhaps, more strictly speaking, registered under the statute 3 G. 4, c. 116, which adopts the statute 6 Anne, c. 2, and in the 6th section re-enacts the 4th section of that Act as to the priority of deeds. Both upon the statute 6 Anne, c. 2, and the statute 3 G. 4, c. 116, the case would be the same. Therefore, if I be right in what I have said upon the statute of Anne, it would follow that the memorial is correct so far as those statutes affect it. However, the statute 2 & 3 W. 4, c. 87, is said to render it defective. Now that is, I may say, a statute in all its parts directory as to the duties of the officers and regulating the establishment of the office, the fees for searches, &c. The 14th section provides for the preparation of certain alphabetical indexes of the names of persons and lands affected by the memorials registered. Great pains seem to have been taken to attain this object. The 17th section provides for an index of lands in a series of parchment books; one book of such series to be appropriated to every county and one to every county of a city; each book appropriated to a county to be divided into baronies; and each book appropriated to

cities to be divided into parishes or streets. The 21st section gives the form of requisition for a search, and only requires an abstract of memorials affecting "names, lands, tenements or hereditaments" in the particular county. However, the 22nd section does away with any inference which might arise from that limitation by enabling persons to vary the terms of the requisition. The 29th and 30th sections are those upon which this question hinges. The 29th section begins by reciting, "And whereas great difficulties have occasionally been experienced in the said register-office from a want of a sufficiently full description being inserted in the memorial of the place in which the lands are situated, and it is fitting that in future memorials such omissions should not be left unsupplied." If the enacting part of the section were in conformity with that recital, there could not be any doubt in the case. But it goes on to provide, "That from the said 31st day of December, in every memorial of any deed or instrument dated after the 31st day of December 1832, brought into the said office to be registered, there shall be specified the county and barony or the town or county of a city and parish, or the town and parish in which the lands and every of them to be affected by registering such memorial are *by such deed or instrument stated to be situated*." Strike out the words "by such deed or instrument stated to be," then the recital and enacting part will be harmonious. But retaining those words, the enactment falls totally short of the recital and the exigency of it.

Even if the Act had stopped there, I think the case would have been plain enough. Now upon that section what would have been the duty, power and discretion of the officer? He is to see that the memorial shall distinctly state the county, barony, &c., in which the lands are by the deed stated to be situated—in fact, all the preliminaries that the section requires, or such of them as the deed contains, and if the memorial fulfil those requisites, to register it. I should like to know what power he could have to refuse to register any memorial which strictly followed the deed in its enumeration and description of the parcels conveyed. There is not any negative provision in the section prohibiting registry, if the memorial merely echoing the deed does not contain all the details of description

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—  
*Judgment.*

1850.

*Chancery.**GARDINER**v.**BLESINTON.**Judgment.*

named in the section ; but on the contrary there is an express injunction that the officer shall register the memorial if it contain the particulars specified in the section, or such of them as are stated in the deed—that is, the memorial may omit a great many of the particulars in the section, provided that it contain those comprised in the deed ; and to see that it does so, is the whole duty and obligation of the officer under that section.

The 30th section shows I think that the 29th section must have been in some way tampered with in its passage through Parliament, for it provides that where a memorial shall be required to be registered of any instrument other than a will, which instrument shall bear date on or before the 31st of December 1832, or a memorial of a will of any date, in which instrument or will the barony or parish in which the land is situated is not mentioned, the defect may be supplied by stating the barony or parish in the affidavit of the execution of the memorial, and such memorial shall in like manner be registered in respect of the omitted barony or parish as if such barony or parish had been stated in the instrument or will and memorial. Now, that affords ground for arguing that a very great absurdity does follow if the 29th and 30th sections, by their combined effect, do not preclude the registry of a memorial of a deed executed since the 31st of December 1832, and not containing the barony and parish. I think they do produce that great absurdity ; but the question is, have I authority to strike out of the 29th section of this Act clear and express words which follow the clear and express words of the 7th section of the statute of *Anne*, importing that the deed is to be the test by which the propriety of the memorial is to be judged, and that so far as the memorial complies with that it is enough, although it may not contain all the particulars mentioned in the Act ? There is no clause regulating priorities in the statute 2 & 3 *W. 4*, c. 87. Unless therefore the 29th and 30th sections amount to a declaration, that unless the barony and parish be stated, the memorial shall not be registered at all, the statute cannot govern the present case. It is here important to refer to the statute 9 *G. 4*, c. 57. The 10th section enacted that it should not be lawful for the Registrar or his deputies to grant any certificate of the

registry of any memorial registered at any time after the expiration of one month after the passing of the Act, unless such memorial should specify the barony or parish, or both, wherein any lands or tenements intended to be affected by such registry are situate. That Act has a twofold bearing upon this question. First, it shows that prior to its enactment those particulars were not necessary, and that the construction put upon the statute of *Anne*, by the cases to which I have referred, was correct. Secondly, it (the statute 9 G. 4, c. 57, s. 10) has been repealed by the statute 2 & 3 W. 4, c. 87, the Legislature then having under consideration the statute 9 G. 4, and seeing the advantage of some provision with regard to the baronies, parishes, &c., yet omits the imperative language contained in the statute of 9 G. 4. The inference to be raised hence becomes very strong when we look to the preamble of the statute 2 & 3 W. 4, which recites that some of the provisions of the Act of the 9 G. 4 have been found inconvenient, and others to occasion an unreasonable expense to parties resorting for information to the said register-office, and the remaining provisions to require alterations and amendments to be made therein. Thus we have here a recital which may apply to the 10th section of the statute of 9 G. 4, c. 57. How can I say that it was not one of the then existing enactments found inconvenient and calculated to throw difficulties in the way of parties by its requiring the specification of baronies and parishes?

I have given great attention to the statute of *Anne*, and have come to the conclusion that this would have been an effective registration under it. The statute 3 G. 4, c. 116, with reference to deeds executed in Great Britain, is, I apprehend, still in force, although there might be a question whether the deed should not, under the statute 2 & 3 W. 4, c. 87, be produced for comparison to the Registrar; having however been received, that question does not arise here. Unless the statute of W. 4 prohibit its registration, I think this memorial is good, and I cannot find any such prohibition, and that statute, as I have said, contains no priority clause. It is my opinion that the memorial of Mr. Mountjoy Martyn's deed is valid, and that accordingly the finding of the Master must be overruled.

1 Reg. Lib. Gen., fol. 147.

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*Chancery.*  
 GARDINER  
 v.  
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 —————  
*Judgment.*

1850.

Chancery.

## MURPHY v. TAYLOR.

Nov. 4, 7, 20.

A, for an expressed consideration of £144, by deed of assignment, absolute in its form, assigned to B a life policy of assurance for £999. The deed did not contain any clause authorising B to sue upon the policy, which was of doubtful validity, in the name of A. Contemporaneously with the assignment A executed to B a bond, conditioned for payment of the sum of £144, with interest. The actual consideration of the assignment and bond was the same sum of £144, and consisted partly of a prior debt due by A to B in respect of some bills of exchange discounted for A by B, nearly

amounting to a sum of £119, and the residue consisted of £25 cash, of which £20 were paid by B to A, and the remaining £5 were retained by B and handed by him in payment of the costs of the assignment and bond to the person who prepared the same. From the time of the assignment B paid the premiums on the policy into a Savings Bank, with notice thereof to the Company, who had refused to receive them when tendered by B. On the death of the insured B, with the consent of A, sued the Company in his (A's) name, and eventually compromised the action on payment of £600 to himself (B). *Held*, on a bill filed by A against B, that the assignment of the policy operated by way of mortgage, and not absolutely, and that therefore A was entitled to an account in respect of the proceeds, but that B should have his costs as in an ordinary redemption suit, and also the costs of the proceedings against the Company.

valid and effectual, and finally a covenant by him for further assurance. Indorsed upon the deed there was a receipt for the sum of £144, signed by the plaintiff. The deed did not contain any power of attorney for the defendant to sue upon the policy in the name of the plaintiff.

On the same day the plaintiff executed a common money bond to the defendant, conditioned for the payment to him of £144, with interest at the rate of £6 per cent. per annum, together with a warrant of attorney to enter judgment in the penal sum of £288. Judgment was entered upon that warrant in the Court of Queen's Bench as of Trinity Term 1845.

Both those instruments were prepared by George Riddick, a solicitor's apprentice; the bill alleged that he then was a partner of the defendant as a bill-broker; this was not proved, but evidence was given showing that he transacted business in the same office as the defendant.

The bill also alleged that George Riddick acted in the matter as solicitor for the defendant. This the defendant denied by his answer.

The following letter was prepared partly in the handwriting of the plaintiff and partly in that of John Riddick (the brother of George Riddick), who on some other occasions, both in and subsequently to the year 1845, had acted as attorney and solicitor of the defendant, but deposed that upon this occasion he acted as attorney for the plaintiff:—

“ 29th July 1845, 99 Abbey-street.

“ SIR—You having passed me your bond for £144, collateral with an assignment of an insurance policy on the life of one Matthew Rogers for £999, with the London, Edinburgh and Dublin Life Insurance Company, to secure four bills of exchange in my hands, amounting to £118. 15s. 11d. and £25 cash, this day handed to you, I hereby undertake, on being paid the said sum, either by the payment of said bills or otherwise, to re-convey to you or any other person you may nominate for that purpose said policy of insurance, and also satisfy said judgment. “ D. T.

“ To P. W. M.”

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*Statement.*

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Statement.

This letter was never signed by the defendant, nor was it returned by him to the plaintiff.

The actual consideration for the assignment of the policy and of the bond was one and the same; it partly consisted of a prior debt of £118. 15s. 11d., due by the plaintiff to the defendant, in respect of four bills of exchange discounted by him for the plaintiff, of which two were overdue and unpaid upon the day of the execution of the assignment and of the bond, and two had not then reached maturity. The residue of the consideration consisted of £25 cash, of which £20 were then paid to the plaintiff by the defendant, and £5 were retained by the defendant and handed by him to George Riddick for the costs of the assignment and bond.

The plaintiff was at the time of the transaction in embarrassed circumstances.

From the time of the assignment the premiums which accrued due upon the policy were regularly tendered to the Insurance Company by the defendant. The Company denied the validity of the policy, and refused to receive the premiums, which the defendant accordingly lodged at a Savings Bank, and gave notice thereof to the Company.

Matthew Rogers, the person whose life was insured, died on the 10th of July 1847.

The Company refused to pay the amount of the policy to the defendant. Its validity was very doubtful. The defendant obtained on the 18th of November 1847 the written authority of the plaintiff to sue the Company in his name, which was accordingly done. In the following year the defendant compromised the suit with the Company, as the bill alleged, on that occasion without the plaintiff's knowledge. The Company paid to the defendant £600 in full discharge of all demands on foot of the policy, each party agreeing to pay their own costs, and the defendant retaining the premiums which had been lodged in the Savings Bank.

The plaintiff having applied to the defendant to account with him on foot of the proceeds of the policy, the defendant refused to enter into any such account, alleging that the policy was assigned

to him absolutely, but he professed his willingness to give up the bills and to satisfy the judgment.

On the 1st of August 1849 the present bill was filed, praying that the indenture of assignment should be declared a security only for the sum really due by the plaintiff to the defendant, and for the costs properly incurred by the latter in his proceedings against the Insurance Company; and also praying for the necessary accounts, and that the bills of exchange and bond should be delivered up to be cancelled, and that the assignment should also be delivered up to the plaintiff, and that the defendant should be decreed to enter satisfaction on the judgment.

The defendant by his answer insisted that the assignment was absolute, and that if the policy had proved insufficient or invalid, he was to have been at liberty to resort to the bond and judgment.

Parol evidence was gone into on both sides in support of the view taken of the case by the respective parties, and was of a very contradictory character. The general result of it appears in the judgment of the **LORD CHANCELLOR** sufficiently for the purposes of this report.

Part of the evidence given on behalf of the plaintiff consisted of a conversation between the defendant and the plaintiff's solicitor in the office of the latter, taken down at the time in writing by his clerk, named Pearce, without the knowledge of the defendant.

**Mr. Christian, Mr. F. Fitzgerald, and Mr. R. Armstrong,** for the plaintiff.

The sole question here is, whether or not, after the execution of the bond and deed of assignment, the £144 continued to subsist as a debt? If it did so subsist, the plaintiff is entitled to an account of the proceeds of the policy received by the defendant, and the absolute form of the assignment is not conclusive: *Walker v. Walker* (a); *Baker v. Wind* (b); *Spurgeon v. Collier* (c); *England*

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*Chancery.*  
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 Statement.

(a) 2 Atk. 99.

(b) 1 Ves. sen. 160.

(c) 1 Eden, 55.

*Argument.*

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Argument.

v. *Codrington* (a); *Vernon v. Bethell* (b). Evidence extrinsic (*ex. gr.* a letter) of a deed absolute in its terms will be admitted to explain the nature of the transaction and to show matter amounting to a contract for defeasance: *Maxwell v. Mountacute* (c). The criterion by which the Court will arrive at the conclusion that this is a mortgage and continuing debt and not a sale are, first—that the defendant retained the bills; secondly, that there was a bond given of date contemporaneous with the assignment and for the same consideration, that bond being conditioned for payment of principal and interest, and a judgment was recovered by warrant on the bond; thirdly, the costs of the transaction were paid by the plaintiff, a circumstance consistent with the character of borrower, but irreconcilable with that of vendor. Suppose that instead of a bond having been given, the deed of assignment had contained a covenant for payment of the money by the plaintiff, in that case the deed could only have operated as a security. What difference can it make, that the contract for payment of the debt exists in a separate instrument, as here in the bond? It is apparent upon the whole case that the defendant intended to stand upon whatever turned out to be the most advantageous point in which to view the transaction, either as a debt or as a sale. That alone is sufficient to entitle the plaintiff to an account: *Jennings v. Ward* (d). The test laid down by Lord Manners in *Goodman v. Grierson* (e), viz., the reciprocity of remedies on both sides, and adopted by Lord Cottenham in *Williams v. Owen* (f), if applied here, shows at once that this is a mortgage transaction. The fact of Mr. John Riddick deposing that he was the attorney for the plaintiff may be accounted for upon the ground that, as is usually the case in dealings between a money lender and his debtor, there was but one attorney.

Mr. Brewster, Mr. Close and Mr. Charles Kelly, for the defendant.

What the plaintiff here asks the Court to do is, virtually to

(a) 1 Eden, 169.

(b) 2 Eden, 110.

(c) Prec Chan. 526.

(d) 2 Ver. 520.

(e) 2 Bell & B. 274, 279.

(f) 5 My. & Cr. 305, 307.

reform the deed of assignment ; that cannot be done except fraud, accident or mistake be shown : *Irnham v. Child* (*a*) ; *Portmore v. Morris* (*b*). Here fraud has not been charged. The plaintiff is in the position of a party seeking specific performance of an agreement with an alleged parol variation ; this he cannot do although a defendant may resist specific performance upon such grounds : *Lawson v. Laude* (*c*) ; *Rich v. Jackson* (*d*) ; *Clowes v. Higginson* (*e*) ; *Higginson v. Clowes* (*f*) ; *Lord Townsend v. Stangroom* (*g*) ; *Joynes v. Statham* (*h*) ; *Woollam v. Hearn* (*i*). The onus falls upon the plaintiff to show that this was a mortgage and not a sale ; his evidence fails to do so ; Mr. John Riddick was not the defendant's attorney on the occasion, therefore the letter alleged to contain the contract for a defeasance cannot bind the defendant who never signed it. There is not any sufficient evidence of a contract for a defeasance. The defendant could not have sued upon the bond if he recovered any sum, no matter how small, on foot of the policy. He would have been restrained by a Court of Equity from suing on the bond in the lifetime of Matthew Rogers. There was not any inadequacy of value in this transaction ; the policy at the time of the assignment was certainly not worth more than £144. The defendant paid the premiums, and was, after Rogers died, authorised by a letter from the plaintiff to sue upon the policy, without a suggestion in that letter that the plaintiff was entitled to any part of the proceeds ; nor has there been any payment of interest by the plaintiff on account of the sum of £144, which, the policy having proved to be better than he had supposed, he now finds it convenient to denominate a debt.—[The LORD CHANCELLOR. It is plain upon the defendant's answer that, if the policy had not produced £144, he intended to be at liberty to resort to the bond.]—The bond must be regarded as given as a compensation in the event of the article sold, the policy, turning out to be invalid or below a certain value.

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Argument.

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|-------------------------------|--------------------------------|
| ( <i>a</i> ) 1 Bro. C. C. 92. | ( <i>b</i> ) 2 Bro. C. C. 119. |
| ( <i>c</i> ) 1 Dick. 346.     | ( <i>d</i> ) 4 Bro. C. C. 514. |
| ( <i>e</i> ) 1 V. & B. 524.   | ( <i>f</i> ) 15 Ves. 516.      |
| ( <i>g</i> ) 6 Ves. 328.      | ( <i>h</i> ) 3 Atk. 388.       |

(*i*) 7 Ves. 211.

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*Chancery.*  
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A sale with an indemnity is of common occurrence. Reference was also made to *Barrell v. Sabine* (a); *Walker v. Walker* (b); *Buxton v. Lister* (c); *Webber v. Farmer* (d), and *Powell on Mort-*

#### The LORD CHANCELLOR.

The parol evidence here is very curious, so much so that did the case turn upon that evidence it might be necessary to send an issue to a jury. I shall however consider whether it may be disposed of upon the undisputed facts which exist in it.

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#### The LORD CHANCELLOR.

Nov. 20.  
*Judgment.* In this case the bill prays that the defendant should account for the proceeds of a policy of assurance which was assigned to him by the plaintiff. The bill proceeds on the ground that the policy was assigned as a security for a debt, and that the defendant is liable to account for what he has received in respect of it. The defendant resists that account, on the ground that the policy was not transferred to him as a security for a debt, but was absolutely assigned, and that he is entitled to retain all its proceeds. The transaction, so far as regards the documents, appears to be this:—Murphy the plaintiff having effected a policy upon the life of one Rogers, assigned that policy to the defendant Taylor for a consideration (as alleged in the deed) of £144. That assignment did not contain any power of attorney authorising Taylor to use the name of Murphy in suing upon the policy. Contemporaneously with it Murphy executed a bond for the identical sum of £144, with warrant of attorney to enter a judgment upon it, which was done. In point of fact the sum of £144 was not paid by Taylor at the time. He had discounted for Murphy four bills of exchange, of which two had not at the time of the assignment reached maturity. It appears that the bills were not considered worth much, if any thing. It is admitted that the actual consideration for the assignment was the amount of those bills, £119, for which Murphy was liable,

(a) 1 Vern. 268.

(b) 2 Atk. 99.

(c) 3 Atk. 383.

(d) 4 Bro. P. C. 170.

and the sum of £25 then paid by Taylor to Murphy. The bills were retained by Taylor up to the institution of the suit. After the assignment he offered to pay the premiums upon the policy. The Company declined to receive them, alleging that the policy was fraudulent; however he deposited the sum in a Savings Bank, and Rogers died shortly afterwards. Upon that event Taylor sued the Company; they resisted the action. Ultimately the Company compromised the matter, and £600 were received by Taylor in full of all demands in regard to the policy. The assignment, as I have stated, purported to be absolute; so did also the bond and judgment. Taylor in his answers admits the giving of the bond and judgment; he speaks of them as a security, but says that he refused to take the policy as one for which he should be bound to account; and that in case the policy proved unprofitable, he was to be at liberty to resort to his remedy on the bond and judgment; and that if the policy proved profitable, he was to have the whole amount—in other words, that he was to have the whole profit, and Murphy to run the whole risk.—[His Lordship here referred to Taylor's answer at length, and also to the evidence of John Riddick, which he said was substantially to the same effect as the case put forward in the answer.]

It was contended on the part of the defendant under these circumstances that the Court must determine the case on the assignment itself, there being no evidence of any agreement for a defeasance. I apprehend that is not the doctrine applicable to cases like this; but that the question is whether, on consideration of all the circumstances, it appears that the intention of the parties was that the instrument should operate absolutely or not? In *Langton v. Horton* (a) Lord Langdale held that a bill of sale of a ship, though absolute in its terms, might, even notwithstanding the Ship Registry Acts, be in equity treated as a mortgage, if such appear to have been the real intention of the parties. In determining whether a conveyance, which on the face of it appears to be an absolute conveyance, shall be considered as an unconditional sale or as a security for money, I find in the note to Mr. Powell's work on *Mortgages*, p. 125, sixth ed., the cases collected as to the circumstances to which Courts of Equity will look. Amongst these is that

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MURPHY  
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(a) 5 Beav. 9.

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of a collateral security, as a bond, judgment or warrant of attorney given at the same time for further securing the supposed purchase money, and that of the expense of preparation of the deed being borne by the grantor. Lord Manners, in *Goodman v. Grierson* (*a*), in discussing whether the deed there was to be considered as an absolute conveyance, says:—"The fair criterion by which the Court is to decide whether this deed be a mortgage or not, I apprehend to be this—Are the remedies mutual and reciprocal? Has the defendant all the remedies a mortgagee is entitled to?" These observations are similar to those made use of in the argument of *Copplestone v. Foxwell* (*b*) by the defendant's Counsel. Trying the case by this test, it is obvious that if it was proved to have been the intention of the parties that this transaction should be a mortgage, it contains, with the single omission of a clause for redemption, the necessary ingredients so to constitute it; for there would be in the circumstances on both sides a perfect reciprocity of remedies. If the policy proved to be fruitful, Murphy would have the right to redeem on payment of his debt to Taylor; and had it on the contrary proved to be an insufficient security, Taylor would have been at liberty to resort to the bond and judgment. The fact of his having taken those securities is undoubted, and we have also the fact that the costs of the transaction were paid by the person who got the money, as in the ordinary case of a borrower. It is, however, relied on in the answer and contended that this transaction is in one sense a purchase, in another a security. It is very difficult to understand that. The defendant says it was the express provision of the parties that, if the policy were not available, the bond and judgment should stand—that is, the relation of debtor and creditor was to continue, and, as was forcibly observed by Mr. Armstrong, the right of action was merely suspended.

In *Verner v. Winstanley* (*c*) Lord Redesdale observed, that what vitiated the transaction, in his opinion, was the defendant's not taking upon himself the whole risk of the annuity, but securing himself by the bond. Here the defendant does not take upon himself the whole risk, because he stipulates for the bond and judgment

(*a*) 2 B. & Bea. 279.

(*b*) Freem. 150.

(*c*) 2 Sch. & L. 393.

in the event of the policy proving insufficient. What drops out in the evidence, as to the bond being a security for the debt, shows that in no case was Taylor to run any risk, and that the parties all along contemplated the subsistence of the debt.

The circumstance which is peculiar to this case is the nature of the thing transferred, a policy of insurance, there being no provision made by the debtor for the payment of the premiums. But is that to control the decision of the case? Is the Court to say that a party getting all the advantages of a mortgage is also to have, in respect to part of the case, the benefit of an absolute purchase? Any risk, in truth, with regard to the policy was not very great. If the Company had taken the premiums, they recognised the validity of the policy; if they had not, the premiums remained in Taylor's pocket. I confess I cannot treat this transaction as at one time an absolute transfer, at another time a mortgage; and recollecting the control which the Court exercises in case of this nature, in order to prevent a creditor from oppressing a distressed debtor, and looking to the facts here presented—an assignment, a bond and judgment without any condition beyond the ordinary one, and the payment of the costs by the party raising the money—I think it does lie upon the person taking such securities to show that he was to run some risk, which the defendant has not done. Turn the case in any way, it comes round to be one possessing all the essential conditions of a mortgage. I see nothing, however, to induce me to say that there has been *mala fides* on the part of Taylor, or to disentitle him to the rights of an ordinary mortgagee in reference to the costs of the suit. I shall not refer to the conversations which took place between the parties. I rest my decision upon the main circumstances of the original transaction. I say nothing as to the evidence of Mr. Pearce, the clerk, further than to express my disapprobation of persons in his situation being employed, without notice, to take down notes of what is said by those who come into the employer's office. I place no weight upon the conversation.

It appears to me on the whole, and independently of any inference to be drawn from that part of the evidence, that the relation of debtor and creditor continued throughout, and that the plaintiff is

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entitled to relief—viz., an account of what Taylor received; but that Taylor must have his costs of this suit, and of enforcing from the Company the payment of the sum secured by the policy, and he is only to be accountable for the sum actually received from the Insurance Company.

1 Reg. Lib. Gen., fol. 63.

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NOTE.—By the minutes of the decree, as drawn up by the Registrar, the defendant was directed to lodge in Court the balance of the proceeds of the policy *with interest*; upon special application to the Court the minutes were varied by directing the defendant to pay over the balance after deducting the amount of the judgment, costs, &c., to the plaintiff *without interest*.



Ex parte ORR,  
 In the Matter of JAMES PETTICREW, an alleged Bankrupt.

Dec. 14.

An order having been made in 1847 superseding a commission of bankruptcy against a party, with costs, to be paid by the petitioning creditors, and before those costs were paid that party having been in 1849 discharged under the Act for the Relief of Insolvent Debtors; *Held*, that the assignee in the insolvency matter, who had been one of the petitioning creditors in the bankruptcy matter, took the costs under the order of 1847, subject to the lien of the solicitor who had obtained that order, and that the assignee could not be allowed to set off as against that lien a debt due to himself by the insolvent when those costs were incurred.

Upon motion the Court varied the order of 1847 by directing the petitioning creditors to pay to the solicitor the amount of the taxed costs.

by him in consequence of that commission ; that these costs had been taxed and certified to be £53. 10s. 8d., and had been demanded from each of the petitioning creditors without success. Mr. Petticrew had since taken the benefit of the Insolvent Act, and the costs would be lost to Mr. Orr unless the order was varied as sought.

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—  
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*Mr. Dix*, for the petitioning creditors, *contra*.

Mr. Petticrew did not take the benefit of the Insolvent Act until the 5th of November 1849, and John Glynn (who had been one of the petitioning creditors) had been appointed his assignee. Mr. Petticrew was indebted in a large sum of money to Glynn, and against that sum he had a right to set off the sum now due for costs, which costs moreover having been awarded to the insolvent, were now legally vested in Mr. Glynn as his assignee. Mr. Orr was bound to look to his own client, and had not taken any proceedings for the recovery or taxation of his costs until after Mr. Petticrew's insolvency, a period of more than two years from the date of the order.

*Mr. Fitzgibbon*, in reply, referred to *Re Rhodes, Ex parte Thomas and Castle* (*a*), and *Ex parte Bryant* (*b*), where it was held, that though an order had been made on a petition in bankruptcy, directing the costs to be paid to the petitioner personally, that order did not take away the lien of the solicitor for his costs.

#### The LORD CHANCELLOR.

I at first felt some doubt as to whether I could make the order, these costs being now legally vested in Mr. Glynn the assignee ; but on consideration it appears plainly that he must take them subject to the same equities to which they would be liable in the hands of the insolvent, and one very clear equity is the solicitor's lien on them, the costs having been awarded in a proceeding in which he acted as the solicitor, and succeeded in obtaining what he sought, viz., a *supersedeas* of the commission of bankruptey against his client, with costs. I shall therefore vary the order as sought. No costs of this motion.

(*a*) 15 Ves. 539.

(*b*) 1 Mad. 49.

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## MURPHY v. KELLER.

*Jan. 25.*

Where on a petition praying a reference to the Master under the 15th section of the Court of Chancery Regulation Act, the Court in the first instance declined to make a summary order *ex parte*, and required notice to be served upon a person interested in the subject-matter of the petition; *Held*, that the Court might afterwards, if it thought proper so to do, make an order of reference to the Master under that section.

*Argument.*

*Mr. Brewster* and *Mr. Thomas Jones*, in support of the petition.

*Mr. Christian* (with whom was *Mr. Lawless*), for the respondents.

Notice having been served upon the respondents, the case can no longer be considered as under the 15th section, and should be transferred to the list of general cause petitions for hearing. The Court having once decided that the respondents have a right to show cause against a reference, the jurisdiction under the 15th section ceases. The requiring notice amounts to permission to the respondents to resist an account altogether, and for this purpose the case must be regularly heard. The Court is bound to ascertain whether or not the petitioner is entitled to any relief at all; and in doing so it will only apply to these petitions the principles upon which it acted with regard to petitions previously to the passing of this Act; *ex. gr.* on petitions for the appointment of new trustees, the Court decided the right of the petitioner to what he sought, and left the ministerial part of the duty only to the Master. The affidavits, recently filed on behalf of the petitioners, the respondents have not had time enough to peruse or answer.

## The LORD CHANCELLOR.

*Judgment.*

I cannot put the construction on this Act of Parliament contended for on behalf of the respondents. The words of the section appear to be as clear as possible.—[His Lordship here read the 15th

section.]—I cannot understand that because the Court has thought it right, previously to making a summary order upon the petition, to cause notice to be served upon any person apparently interested in the matter of it, the case therefore ceases to be within the 15th section of the Act, and the Court cannot make any summary order at all. If the effect of notice so given were to transfer such cases from that section, I should feel bound, in order to give any effect whatever to the jurisdiction thereby conferred upon the Court, to pronounce an *ex parte* order in the first instance. That might for me be a very convenient course, inasmuch as it would not be necessary for me to peruse each petition, as I now do. I might send it *per saltum* into the Master's office. But I do not assent to the proposition. The requirement of preliminary notice is I think a matter of caution only, and does not tie up the hands of the Court. The object of this section of the Act was in some degree similar to that of the Winding-up Acts, and in ordinary cases to dispense with the attendance of the respondents before this branch of the Court. No doubt when the Court has as a matter of caution called upon a respondent to attend, it may dispose of the case finally then, as the whole petition may be shown to be false or unsupported; or in consequence of what the respondent may show to the Court, it may be found necessary that special directions should be given to the Master; but the benefit of the section would be wholly lost if it be once held that the effect of giving notice under the direction of the Court is to transfer the petition altogether from its operation. I am satisfied that it never was intended by the Legislature that the Court should be thus deprived of the power of acting under that section, and that it is perfectly within my discretion now to decide whether or not the case shall forthwith go into the Master's office, and the whole matter of the petition be left open to him for disposal on a summary reference. I am not, looking on the case in this view, bound to give any special directions, or to enter further into its merits. I shall however in the present instance allow the case to stand until next petition day, in order that the respondent may have time to read the affidavits recently filed by the petitioner and the arbitrator M. Murphy, and also that, if so advised, the respondents may file new affidavits.

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## HOMAN v. ANDREWS.

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Nov. 4.

A payment of principal or interest of a sum of money charged upon lands by a person expressly or impliedly authorised to make it, will be equivalent to a payment by the party liable, so as to prevent the operation of the Statute of Limitations (3 & 4 W. 4, c. 27, s. 40). But a payment by a stranger will not.

Parties being seized of the lands of A and B, subject to a term to pay off incumbrances, conveyed A to a purchaser, and B to trustees to indemnify and protect the lands of A from all charges and incumbrances; and by a subsequent deed W, who was the owner of the lands of B, subject to the trust to indemnify, covenanted to pay the interest of one of the charges. Held, that it being W's duty to pay the charges, payments of interest by him were payments by an agent to save the bar of the statute as against the purchaser of A.

But *Semble*—The payment of interest by the owner of the indemnity lands, after the expiration of twenty years, would not revive the right to proceed against the purchased lands.

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|-------------------------|-------------------------------|
| (a) 3 T. R. 762.        | (b) 2 Bing. N. C. 249.        |
| (c) 2 Jebb & S. 389.    | (d) 5 M. & W. 494.            |
| (e) 2 H. & Br. 423.     | (f) 5 Law Rec. N. S. 77       |
| (g) 10 Cl. & Fin. 319.  | (h) 11 Ir. Eq. Rep. 561.      |
| (i) 3 Russ. 188.        | (k) 2 B. & Cr. 23.            |
| (l) 1 B. & Ad. 396.     | (m) 5 Hare, 55.               |
| (n) 7 Beav. 326.        | (o) 5 Br. P. C. by Toml. 504. |
| (p) 5 Ir. Eq. Rep. 511. |                               |

*Mitf. on Pl. p. 164; Mare v. Malachi (a); Archbishop of Dublin v. Lord Trimleston (b); Lord St. John v. Boughton (c); Greenwood v. Atkinson (d).*

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The MASTER OF THE ROLLS.

In this case a demurrer to the bill has been filed by two of the defendants, Maunsell Hawtry Andrews, and Ellen his wife. The bill has been filed by the plaintiff, Lucinda Homan, executrix of Robert Homan deceased ; and it prays that a sum of £700 late currency may be declared to be well charged on the lands of Annaghmore and Dysart in the county of Kerry ; that an account may be taken of what is due on said charge, for principal and interest, an account of all other incumbrances, and a sale of the interest in the said lands, created by a lease of the 1st of May 1738, to pay what should be found due.

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The defence raised by the demurrer is, that on the facts stated in the bill, the claim of the plaintiff as against the said lands is barred by the Statute of Limitations. The facts of the case as appearing on the bill, so far as they are material to the decision of the demurrer, are as follows :—Richard Meredith the first being seised in fee of the lands of Annaghmore and Dysart, by lease bearing date the 1st of March 1738, demised them to William Meredith the first, and his heirs, for three lives, with a covenant for perpetual renewal, at the rent of £120. On the 1st of February 1768, certain articles of agreement were made and executed between the said William Meredith the first of the one part, and his eldest son Richard Meredith the second of the other part, whereby the said William Meredith the first agreed to convey his estate and interest in the said lands to Richard Meredith the second and his heirs, subject to a charge and provision for payment thereout of a sum of £2500, late currency, to be vested in trustees, for the payment of the portions of the five younger children of the said William

(a) 1 M. &amp; Cr. 576.

(b) 12 Ir. Eq. Rep. 251.

(c) 9 Sim. 219.

(d) 5 Sim. 419.

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Meredith the first, in such shares and proportions as the said William should by deed or will appoint. The £500 sought to be raised by the present bill is part of the said sum of £2500.

Frances Meredith, one of the younger children of the said William Meredith the first, married Robert Coote, and on the occasion of the marriage, on the 19th of August 1769, the said William appointed the said sum of £500, being part of the £2500, in the manner in the bill mentioned; and the said sum of £500 became afterwards vested in the plaintiff Lucinda, who was one of the children of the said Robert and Frances Coote. Richard Meredith the second subsequently married Lucy Saunders, and the interest in the lease of 1738 was, by deed of the 20th of October 1770, put in strict settlement.

William Meredith the second was the only son of the marriage; and, he having attained his age, a deed was executed bearing date the 21st of October 1795, whereby the said Richard Meredith, who was tenant for life, and the said William Meredith the second, who was *quasi* tenant in tail, conveyed the estate and interest in the said lease, to the use of trustees for a term of five hundred years, upon trust to pay, by sale or mortgage of said lands, or a competent part thereof, the incumbrances and charges in the first and second schedules thereto mentioned, and after the expiration of the term, to the use of the said William Meredith and his heirs.

The bill then charges that in the first schedule to the said deed, the said sum of £500 is expressly mentioned as a then existing charge on the lands of Annaghmore and Dysart, and as being then vested in the plaintiff's father, Robert Coote, in right of his wife, Frances Coote, otherwise Meredith.

By deed of the 23rd of June 1797, the said William Meredith the second conveyed all the estate and interest in the lease of 1738 to John Saunders and his heirs; and in order to indemnify the said John Saunders from all incumbrances affecting the lands of Annaghmore and Dysart, William Meredith the second conveyed the lands of Tiernagoose and other lands to trustees (who from the recitals in the deed appear to have been named by John Saunders), for five hundred years, for the purpose of indemnifying

and protecting the purchased lands of Annaghmore and Dysart, and the said John Saunders, as the purchaser thereof, from all charges and incumbrances affecting same.

The bill then states the marriage of the plaintiff with Robert Homan in 1799, and the settlement, on the occasion of the said marriage, between the said Robert Coote and Frances his wife of the first part, the said William Meredith the second of the second part, the plaintiff of the third part, and her intended husband Robert Homan of the fourth part, whereby £200 part of the £500 was vested in the said Robert Homan; and the said William Meredith covenanted that so long as the said sum of £200 should be suffered to remain out at interest, as a charge on the lands of Annaghmore and Dysart, and until the same should be legally raised or called in, the interest thereof at six per cent. per annum should be paid to the said Robert Homan and his executors, by half-yearly payments; and the said William Meredith further covenanted that in case the said interest was not paid, the said Robert Homan should be at liberty to enter into and distrain the lands of Tiernagoose, Dicksgrove and Cummamore, as in case of non-payment of rent, and Robert Homan covenanted that while the said sum of £200 should remain out at interest, he would not resort to the lands of Annaghmore and Dysart for the interest thereon, provided he was paid the same by the said William Meredith, or out of the lands of Tiernagoose and Cummamore.

The bill then states certain deeds bearing date in 1804 and 1815, under which the sum of £300, residue of the £500, became vested in Robert Homan.

The bill then states that Robert Homan having thus become entitled to the entire of the said sum of £300 so charged on the said lands of Annaghmore and Dysart, received from time to time different small sums, on account of the interest thereof, from the said William Meredith, who as between himself and John Saunders was the person primarily liable to keep down such interest, in order to prevent the plaintiff having recourse to the purchased lands for recovery thereof.

The bill then states the death of Robert Homan in 1825, there

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being then an arrear of interest due to him on the said sum of £500, of £232, and that he made his will on the 13th of August 1825, which the plaintiff has proved.

The bill then sets out the title of the principal defendants Lucinda Durant, and Maunsell Hawtry Andrews and Ellen his wife, from which it appears that the estate and interest in the lease of Annaghmore and Dysart became vested in Arthur Lloyd Saunders, the son of the purchaser John Saunders: and on the death of said Arthur Lloyd Saunders intestate and unmarried, the said lands descended in *quasi* fee on his sisters Lucinda Durant and Ellen Harding Andrews, who with her husband has taken the demurrer.

The bill then states that the entire sum due on foot of the said charge of £500, up to the 25th of March 1825, being the gale day next preceding the death of the said Robert Homan, is £732, £500 late currency being the sum due for principal and interest; and that from and after the death of her husband, the said Robert Homan, the plaintiff, as the person entitled to the said sum of £500, received from *time to time* from the said William Meredith (who the bill charges was, under the agreement hereinbefore-mentioned, the proper person in the first instance to pay the same) different sums on account of interest on the said charge, and that on the 16th of November 1840 an account was drawn out by the said William Meredith, in his own handwriting, showing that the total amount of payments made by him to the plaintiff for interest, up to that period amounted to £338. 1s. 8d., for which the plaintiff then, at the request of the said William Meredith, signed a receipt as follows:—

“Received from William Meredith by sundry payments, as stated in the account thereof annexed to this receipt and signed by me, the sum of £338. 1s. 8d. on account and in part payment of interest due to me and my children. Received the same as widow and executrix of the late Robert Homan deceased. Dated this 16th of November 1840.”

“LUCY HOMAN.”

The bill then states that the general account for principal and interest on foot of said charge on the 16th of November 1840, after

giving credit for said payments of £338. 1s. 8d., stood as follows :—

Principal sum (Irish)	...	...	...	...	£500 0 0
Interest thereon up to March 1825, the gale day previous to Robert Homan's death	...	...	...	...	232 0 0
					<hr/>
					£732 0 0
British,	...	...	...	...	£675 13 10½
Interest on principal sum from March 1825 to March 1840 (fifteen years)	...	...	...	...	415 7 9½
					<hr/>
					£1091 1 8
1840 November 16, by cash in sundry payments	...	...	...	...	338 1 8
					<hr/>
					£753 0 0

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It will be observed that interest was paid to Robert Homan up to the 29th of September 1817, except a few pounds. But no subsequent payment was made to him in his lifetime, and in September 1837, twenty years' interest would have accrued ; and unless the statement in the bill that William Meredith, from time to time, made various payments to the plaintiff ; and the statement, in the receipt and account, that sundry payments in cash, amounting to £338. 1s. 8d., were made prior to November 16, 1840, amounts to a statement that some of those payments were made to the plaintiff prior to the 25th of September 1837, there is no allegation of any payment of interest, on foot of the charge of £500, from September 1817 to September 1837.

The bill then states several payments made by William Meredith to the plaintiff from the 16th of November 1840 to the 25th of November 1846, leaving the total sum due to the plaintiff, for principal and interest to that date, £422. 17s. 6d.

The bill then charges that under the circumstances hereinbefore detailed, in reference to the covenants entered into by the said William Meredith with the said John Saunders, on the occasion of his purchase of the interest in the lease of said lands of Annaghmore and Dysart, such payments, on account of said charge, were properly made by the said William Meredith to the plaintiff, in exoneration of the liability of the said purchased lands to the said charge ; and that such payments by the said William Meredith must be taken to have been made by him as the duly appointed agent of the said John Saunders, for such purpose and on his account and behalf.

The bill then states that the whole of the charge of £2,500, with

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the exception of the said sum of £422. 17s. 6d. has been long since paid off. The bill then states that in the year 1849 the said William Meredith the second died, leaving Richard Meredith his eldest son and heir him surviving, and that the said Richard is now in possession and receipt of the rents of said lands of Tiernagoose and Dicksgrove; but that he denies all liability to pay the sum claimed by the plaintiff.

The question which arises is on the construction of the 40th section of the Statute of Limitations, 3 & 4 W. 4, c. 27. This suit to recover the sum of £500 (part of the charge of £2500 created by the articles of the 1st of February 1768) having been instituted long after the period of twenty years after a present right to receive the same accrued to a person capable of giving a discharge or receipt for the same; and there being no statement of any acknowledgment in writing, such as is required by that section, the question is, whether there was any payment of part of the principal money, or some interest thereon, within the meaning of the statute?

The 40th section, after enacting that no suit shall be brought to recover any sum of money charged upon any land but within twenty years next after a present right to receive the same shall have accrued, &c., proceeds thus:—"unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent," &c.

It has been contended that the latter part of the clause which I have read applies equally to the payment of part of the principal or interest as to the acknowledgment in writing, and that the clause is to be read interposing a stop at the word "signed." I do not concur in that argument; but it appears to me immaterial, for there is no doubt that a payment of a part of the principal or some interest, by a person expressly or impliedly authorised to make the payment, will be equivalent to a payment by the party liable. There are several authorities to that effect under former Statutes of Limitation.\* The payment, however, cannot be by a mere stranger.

\* See cases referred to in *Smith's Leading cases*, note to *Whitcomb v. Whiting*.

In the case of *Linsell v. Benson* (*a*), Tindal, C. J., in commenting on the 9th G. 4, c. 14, observed :—“The second point is, whether there has been in this case any payment of part of the debt such as to take the case out of the operation of the statute? The words are, ‘Nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever;’ that is, of any payment made by the principal debtor, or any one acting under his authority. That never can mean a payment made by a mere stranger, and without authority.”

The first question, therefore, in this case is, whether the payments made by William Meredith were made by a person authorised to make such payments, so as to bind the purchased lands of Annaghmore and Dysart in the hands of the purchaser, John Saunders, and those deriving under him?

It has been decided that if lands are subject to a common charge, the payment of interest by any party liable, and who is entitled to a part of the lands, will keep the charge alive as against all persons entitled to other portions of the lands: *Archbishop of Dublin v. Lord Trimleston* (*b*) ; *Warren v. Bateman* (*c*).

That principle does not exactly govern the present case. I am however of opinion, upon the whole, that upon the facts detailed in the bill, William Meredith was a person authorised to pay the principal and interest on foot of the charge of £500; and that payments made by him (subject to another question to which I shall hereafter advert) were payments which would keep the charge alive as against the lands of Annaghmore and Dysart, under the deed of the 24th of October 1795. William Meredith was seised in *quasi* fee of the lands subject to a trust term of five hundred years created to pay off incumbrances, and amongst others the charge of £500. By the deed of the 21st of June 1797, he and his father conveyed the said lands to John Saunders and his heirs; and they also conveyed the lands of Tiernagoose and another denomination to trustees named by the purchaser, John Saunders, for five hundred years, to

(*a*) 2 Bing. N. C. 249.

(*b*) 12 Ir. Eq. Rep. 265.

(*c*) Fl. & Kel. 454.

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indemnify and protect the purchased lands of Annaghmore and Dysart from all charges and incumbrances.

It has been argued that the effect of a conveyance of lands by a vendor to trustees, for the purpose of indemnifying other lands which are sold, cannot be to make the vendor an agent for the purchaser to keep the incumbrances alive. I am of opinion, however, that it was the duty of William Meredith (who was the beneficial owner of the indemnity lands, subject to the trust to indemnify) to pay the interest as well as the principal of the charge of £500, and that the payments of interest were payments preventing the operation of the statute, as to the sold lands, unless the objection to which I shall hereafter advert is fatal to the bill.

If Robert Homan in his lifetime, or the plaintiff after his death, had taken proceedings to recover the £500 and interest out of the lands of Annaghmore and Dysart, John Saunders or those deriving under him could have filed a bill for the purpose of being indemnified by sale of the trust term of five hundred years in the indemnity lands. Richard and William Meredith were beneficially entitled to those indemnity lands, subject to the trust term, and William Meredith paid the interest on the charge.

I am of opinion, upon the whole, that William Meredith had implied authority to pay part of the principal or the interest on the charge of £500, so as to bring the case within the exception in the 40th section of the statute.

The next objection which has been argued is, that the bill is defective for want of parties, and that Richard Meredith, the son of William Meredith, in whom the indemnity lands appear to have become vested, was a necessary party, as also the personal representative of said William Meredith. With respect to Richard Meredith, the plaintiff has no right, in my opinion, to seek to levy the charge out of the indemnity lands. Robert Homan was no party to the deed conveying the indemnity lands, and was not to be regarded as a *cestui que trust* entitled to enforce payment out of such lands: *Law v. Bagwell* (a).

As to the personal representative of William Meredith, I have

(a) 4 Dr. & W. 398.

not heard any ground upon which such representative should be made a defendant. I am therefore of opinion upon the questions argued before me that the demurrer is not sustainable.

There is, however, a question arising upon the record which was not argued, and upon which I have felt much difficulty. It appears from the statements in the bill that at the death of Robert Homan there was an arrear of interest due up to the 25th of March 1825 (the gale day previous to his death), amounting to £232.

Thus the last gale of interest paid to Robert Homan was the gale which fell due on the 25th of September 1817, less by a few pounds, and it may be contended that the charge of £500 was barred by the Statute of Limitations, on the 25th of September 1837, unless in the interval between the 25th of September 1817, and the 25th of September 1837, some interest was paid. The first question therefore which arises is, whether there is any sufficient statement in the bill that interest was paid in that interval? and secondly, if no interest was paid in that interval, were the subsequent payments made by William Meredith sufficient to take the case out of the operation of the statute?

As to the first question, there is no express statement that interest was paid from the 25th of September 1817 to the 25th of September 1837. It is, however, charged that from and after the death of her husband, the plaintiff from time to time received from William Meredith different sums on account of interest on the said charge, but does not state the date of any payment.

The bill then sets forth a receipt of plaintiff's, dated the 16th of November 1840, acknowledging to have received from William Meredith, by sundry payments, the sum of £338. 6s. 8d., in part payment of interest on the charge; and an account is set out which, after stating the arrear of £232 due on the 25th of March 1825, the gale day previous to Robert Homan's death (being more than seven and a-half years' interest), debits William Meredith with fifteen years' further interest from the 25th March 1825, to March 1840, and then follows this credit—"1840, November 16, 1840. By cash in sundry payments £338. 1s. 8d.;" and a balance is then struck showing a balance of about eight and a-half years' interest then still due after all credits. There is no statement whatever of

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the dates of any of those sundry payments, all of which, consistently with the statement in the bill, may have been made between the 25th of September 1837, and the 16th November 1840; and unless the previous statement, that the plaintiff from time to time received from William Meredith different sums on account of interest, is to be considered as a statement that some of the payments were made prior to the 25th of September 1837, there is no allegation on the subject. The difficulty then is this:—Lord Cottenham has laid down, in *Columbine v. Chichester* (a), that “the presumption is always against the pleader, because the plaintiff is presumed to state his case in the most favourable way for himself, and therefore if he has left any thing material to his case in doubt, it is assumed to be in favour of the other party;” and in the case of *Bright v. North* (b) his Lordship states, “the rule is to take the case as strongly against the pleader as his statements will justify.” There are other cases to the same effect. If I am to infer that the expression “from time to time” must mean that payments were made prior to the 25th of September 1837, then the legal question to which I shall just now advert falls to the ground; but if it may mean that payments were made between the 25th of September 1837, and the 16th of November 1840, then the question of law arises whether William Meredith could, upon the facts stated in the bill, have any authority to make the payments, so as to bind the defendants? It is to be observed, that the statement that payments were made from time to time cannot mean that the interest was regularly paid, after the death of Robert Homan, up to the 16th of November 1840; because it appears from the account set out in the bill that, after crediting all payments to that day, there remained a balance of about eight and a-half years’ interest due.

With respect to the legal question, there is no doubt (at least it has been so decided) that, where two persons are jointly liable on a simple contract, payment of interest by one, after the expiration of six years, will be evidence of a new promise by both. The cases are collected in *Goddard v. Ingram* (c). Whether the same principle

(a) 2 Phil. 28.

(b) 2 Phil. 230.

(c) 3 Q. B. Rep. 839.

would be applied where lands are subject to a common charge, and where a person entitled to a part of the lands pays interest after the lapse of twenty years, having paid no interest in the interval, has not I believe been decided, nor is it necessary to offer an opinion on the point in this case. In the present case William Meredith was not liable, nor were the indemnity lands liable to a common charge. The grounds on which payment of interest by William Meredith, if made in proper time, affected John Saunders and the defendant is, that he, as the beneficial owner of the indemnity lands, might be considered as the agent of John Saunders and the defendants, if the effect of his act of payment of principal or interest was to indemnify and exonerate the lands of Annaghmore and Dysart. But if the lands of Annaghmore and Dysart had ceased to be altogether liable on the 25th of September 1837, by the operation of that statute, I do not see how it would be possible to hold that William Meredith, a beneficial owner of the indemnity lands, could revive a demand against the purchased lands from which they were discharged by the operation of the statute. That would be to make the conveyance of the indemnity lands a means of operating and not exonerating the purchased lands. The question therefore, whether I can, consistently with the rule of pleading which I have stated, infer that the payments were not all made between the 25th of September 1837 and the 16th of November 1840, but that some were made prior to the 25th of September 1837, becomes very important; and as this question has not been raised or argued, I should wish before deciding that question to hear the point argued by one Counsel at each side. The case of *Gresson v. Hindley* (a) has some bearing on the question. If the plaintiff wishes to get rid of the objection, and is in a position to prove that interest was paid before the 25th of September 1837, I should allow the bill to be amended on payment of costs, which would save the expense of a further argument; but otherwise I should be glad to hear an argument on the questions I have stated, and which were not raised before me.

[Counsel for the plaintiff having desired leave to amend, the demurrer was allowed with costs, and liberty given to amend.]

(a) 10 Jur. 383.

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O'MALLEY v. DENNY.

Nov. 3, 25.

Interrogatories having been annexed to a cause petition without the leave of the Court, an order was made that they should be allowed to stand, reserving the costs occasioned by them until the hearing of the cause.

The cause petition in this case was filed with interrogatories annexed thereto, without the leave of the Court having been previously obtained, as required by the 8th section of the Chancery Regulation Act (13 & 14 Vic. c. 89). The petition was verified by the short form of affidavit given in the schedule to the Act.

Mr. Johns, for the petitioner, moved that the interrogatories annexed to the petition might be allowed to stand, or that the interrogatories might be expunged, and the petitioner be at liberty to file new interrogatories. The motion was founded on an affidavit, stating that the petitioner was advised that the interrogatories were necessary.

His Honor expressed some doubt whether such an order could be made without invalidating the affidavit, being under the impression that the interrogatories, as well as the statement in the petition, were verified by the affidavit.

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Judgment.

The MASTER OF THE ROLLS.

I have seen the original petition in this case, and I find that the difficulty which I thought existed does not in fact exist. The petition is verified by an affidavit at foot of it, but the interrogatories are not a part of the petition. They are annexed to the petition, but form no part of it. I could therefore order the interrogatories, which have been filed without leave of this Court, as required by the 8th section, to be expunged without invalidating the affidavit, and I should then have authority, under that section, to allow interrogatories to be filed.

As such an order would lead to unnecessary expense, I think I may

do what is substantially the same thing—viz., allow the interrogatories to stand, as if filed on this day. The difficulty in these cases is this:—It is plain, on reading the 8th section of the Act of Parliament, that the object of the Legislature, in requiring the leave of the Court to file or annex interrogatories to be answered by the respondent, was to get rid of the prolixity of pleadings. It is difficult for me, on an affidavit such as has been filed in this case, or indeed in any case, to come to a satisfactory conclusion at this stage of the proceedings, whether or not interrogatories are required or ought to be filed? The course which I shall adopt is to make a provision in the order as to the costs, reserving for the hearing of the petition not only the plaintiff's right to, but his liability to pay, all costs consequent on the interrogatories. The Court will then be able to judge whether the interrogatories were annexed for the purpose of swelling the costs, and if so, will have power to punish the party for doing so. That reservation in the order will, I trust, be a check against the improper filing of interrogatories. In strictness, perhaps, I have no authority to reserve the question of the costs of an interlocutory motion until the hearing; but as it is clear that such authority should be given to the Court by a General Order, I think I may reserve the question of the costs.

1850.  
Rolls.  
O'MALLEY  
v.  
DENNY.  
Judgment.

Let the interrogatories annexed without the leave of the Court to the petition filed in this matter on the 8th of November instant be allowed to stand as if filed on this day, and reserve until the hearing of the petition the question of the costs of this motion and the order thereon, and of the said interrogatories and the proceedings thereon, and of the liability of the petitioner to pay the additional costs occasioned by such interrogatories, if it shall appear that the same have been unnecessarily filed.

*Rolls Motion Book, 302, fol. 296, 1850.*

1850.  
*Rolls.*

### MONTGOMERY v. EYRE.

*Nov. 26.*

In general cause petitions should be verified by the petitioner.

Form of order on an application that a petition be received without the affidavit of the petitioner.

*Judgment.*

MR. HICKIE, for the petitioner, moved that a cause petition might be received without the affidavit of the petitioner. As there was no cause or matter pending, the motion was unsupported by any affidavit.

#### The MASTER OF THE ROLLS.

I think there is considerable difficulty in making the order sought. So long ago as 1712 it was ordered by a General Order of the Court "that for the future no affidavit be annexed to the petition, that the contents of the petition be true, but that the *parties* do make an affidavit of the facts" (*a*). The first of Sir Edward Sugden's Orders of 1843 provides "that the abrogation of any existing rule shall not be deemed to alter or affect the established practice of the Court originating therefrom." The practice of the Court, founded on the Order of 1712, has been that a petition cannot be verified by a short form of affidavit underwritten or annexed. Each particular statement must be verified and the affidavit must, by the terms of the Order, be made by the "parties." The Court, no doubt, occasionally entertains ordinary petitions not verified by the petitioner. Thus, a petition by a lunatic is usually verified by the committee; a petition by a minor by the guardian or next friend; and where the facts lie particularly within the knowledge of the solicitor for the petitioner, petitions are sometimes verified by the solicitor: but as a general rule an ordinary petition is and ought to be verified by the affidavit of the petitioner himself.

The 5th section of the late Act appears to recognise the practice that the petition should be verified by the petitioner. By that section it is enacted, "that every petition to be presented under this Act *may* be verified by affidavit annexed thereto, or subscribed

*Smith's Rules*, ed. of 1839, p. 67.

at the foot thereof in the form or the effect set out in the schedule annexed to this Act; and that with respect to petitions authorised to be referred to the Master in a summary way, as hereinafter provided, no costs of any further or additional affidavit in verification shall be allowed, unless specially allowed by the Court." On referring to the schedule to the Act, the form is, "I, A B the petitioner in the above written (or annexed, *as the case may be*) petition make oath and say," &c. If therefore the short form of affidavit is adopted, it would appear that, until some General Rule be made on the subject, the petition should be verified by the petitioner. If the short form of affidavit be not adopted, then the petition should be verified according to the ordinary practice, which, as a general rule requires, that the petitioner should verify the same. If this Court is to make orders that petitioners may verify petitions in any manner they please, without any affidavit or document to show that it is a proper case to dispense with the general rule, the consequence will be that, before a year, the important rule of the Court recognised by the statute, that petitions should be verified by the petitioner, will be abrogated, and cause petitions will cease to be verified by the petitioner.

The verification of cause petitions by the petitioner is, in my opinion, a matter of considerable importance. It ought to lead to reform in the system of Equity pleading. Under the practice in force until the recent statute, bills have been drawn in the majority of cases with most unnecessary prolixity. The instructions received from the client would often not occupy a sheet of paper; a draft was made from this containing most prolix statements, charges, and pretences, many of them purely imaginary, to which were added interrogatories founded on every statement and charge in the bill, the interrogatories being in many cases entirely unnecessary. One of the objects of the Chancery Regulation Act is to reform this discreditable system, leading to such enormous and such unnecessary expense. Interrogatories are not to be added without the leave of the Court. The cause petition is to be verified by affidavit, which the bill in general was not. It is intended by the statute that the

1850.  
Rolls.  
MONT-  
GOMERY  
v.  
EYRE.  
—  
Judgment.

1850.

Rolls.MONT-  
GOMERYv.EYRE.Judgment.

petition should be a plain simple statement of the facts of the case. The verification of the petition ought to prevent the introduction of the various imaginary charges and pretences so often contained in bills ; and the knowledge that the petition must be read by the petitioner, if he verifies it, will or ought in itself to operate as a check on prolixity, as well as prevent the introduction of imaginary charges.

I am therefore of opinion that cause petitions should be verified by the petitioner, unless some sufficient reason be shown why he does not make the affidavit. The difficulty which exists in this case is that there is no affidavit or other document to show why the petitioner does not verify the petition ; and it is said that an affidavit cannot be filed, there being no matter or cause pending. I think, therefore, the order which I should make should be to direct the Deputy Keeper of the Rolls to receive the petition, with such affidavit as the petitioner may be able to procure ; but that no further proceeding should be taken on the petition until an affidavit shall be made accounting for the circumstance that the petition has not been verified by the petitioner.

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Nov. 26.

The MASTER OF THE ROLLS stated that he had drawn up an order ; but that, to prevent the expense of a second order in cases of this kind, a General Order ought to be made regulating the practice.

Let the Deputy Keeper of the Rolls be at liberty to receive the petition, with such affidavit verifying the facts of the same as the petitioner may be able to procure. No further proceedings to be taken after the filing of the petition until an affidavit shall be made to explain why the petition cannot be verified by the affidavit of the petitioner, and until the order of the Court shall be obtained for liberty to

proceed on such petition, and let the petitioner abide his own costs of this motion.

*Rolls Motion Book, 302, fol. 328, 1850.\**

1850.  
*Rolls.*

MONT-  
GOMERY  
*v.*  
EYRE.

Judgment.

\* After the making of this order the Lord Chancellor gave directions to the Deputy Keeper of the Rolls to receive petitions verified by such affidavit as the petitioner may be able to procure, without any order of the Court; and the **MASTER OF THE ROLLS** thereupon struck out the latter part of the above order, directing that no further proceedings should be taken without the leave of the Court.

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GRAVES *v.* HOLLAND.

Nov. 23, 25.

MR. E. BLACKBURN, for the petitioner, moved that he might be at liberty to amend the cause petition filed in this matter by adding thereto as follows:—"And your petitioner sheweth by way of amendment that since the time of verifying the said petition, he has ascertained that the statement contained in the said petition, viz., that Robert Holland, M.P., was the heir-at-law and personal representative of the surviving trustee of the indenture of settlement of 1792, was not correct; but that the Rev. Edmund Holland is heir-at-law and personal representative of such surviving trustee; and that the same solicitors in England, viz., Messrs. White and Bennett, were in the habit of acting, as your petitioner believes, for both Mr. Robert Holland and the Rev. Edmund Holland; and that after the decease of the said Sophia Bellew, your petitioner wrote to the said solicitors, requesting that measures should be taken to carry out the trusts of the said settlement; but no steps were taken for the purpose."

Amendments of cause petitions are to be made without alteration, erasure, or interlineation, by stating the matter of the amendment at the foot of the petition after the affidavit to verify, or by indorsement thereon.

1850.

*Rolls.*

GRAVES

v.

HOLLAND.

*Judgment.*

## The MASTER OF THE ROLLS.

In this case an application was made that the petitioner should be at liberty to amend the petition.—[His Lordship stated the amendments.]

I requested Mr. *E. Blackburne*, who moved the motion, to furnish me with a statement in writing of the amendment. He has done so, and I have accordingly made the order.

I think there is some misconception on the subject of the amendment of cause petitions. Cause petitions are usually verified by the short form of affidavit in the schedule annexed to the statute. That form is as follows:—"I, A B, the petitioner in the above-written (or annexed, as the case may be) petition, make oath and say that so much of the above-written (or annexed, *as the case may be*) petition as relates to my own acts and deeds, is true; and so much thereof as relates to the acts and deeds of any other person, I believe to be true."

If a petition, so verified, was altered or amended by erasure or interlineation, it would affect the validity of the affidavit so underwritten, or annexed.

Where a document is sworn (for example, an answer) the Court does not permit it to be amended. If there is an error in the statement of any substantial matter, the Court will, under circumstances, allow a supplemental answer to be filed, to correct the error. So if there is a mistake in the title of the answer, the Court has allowed the answer to be taken off the file—the title to be amended, and the answer re-sworn. So where a document is verified by a short form of affidavit, underwritten or annexed thereto, and referring to such document, it is not the practice to allow the document to be amended, as it would affect the validity of the affidavit.

Thus in the case of *Fenton v. Fenton* (*a*), the late Master of the Rolls refused to permit a discharge to be amended (*b*). And in the case of \_\_\_\_\_ *v. Steele* (*c*), the Lord Chancellor (then Lord Chief Baron) refused to allow a petition under the Sheriffs' Act to be

(*a*) 8 Ir. Eq. Rep. 363.

(*b*) See form of affidavit verifying discharge, *Beasley's Precedents*, 4th ed. p. I.

(*c*) 8 Ir. Eq. Rep. 511.

amended. I have been informed by Mr. W. Smith that petitions in the Court of Exchequer, under the Sheriff's Act, were verified by a short form of affidavit underwritten or annexed, and were not verified in full by a distinct affidavit, according to the practice of the Court of Chancery; and that decision, which at first I did not understand, being unaware of the Exchequer practice, is therefore in accordance with the case of *Fenton v. Fenton*.

There is another class of cases in which the amendment of documents, which are verified by affidavit, is permitted. It is the practice, both in England and Ireland, to allow injunction bills, which are verified in full, to be amended without prejudice to the injunction. So also in the case of ordinary petitions in the Court of Chancery; they are verified in full, and not by a short form of affidavit underwritten or annexed; and accordingly the amendment of such petitions has been permitted. It will, however, be observed, that the amendment of a bill or petition, verified in full by a distinct affidavit, which is not annexed or underwritten, but filed in a different office, can in no way affect the validity of the affidavit.

The question which arises in this case is, as to the mode in which cause petitions should be amended, when they are verified by the form of affidavit underwritten or annexed. The proper course, in my opinion, having regard to the authorities to which I have referred, and to the principles upon which those cases have been decided is, not to allow any erasure, alteration, or interlineation in the petition; but to direct that the amendment should be made at foot of the petition, after the affidavit to verify, or should be endorsed thereon. This course will lead to no difficulty, even in the case of clerical amendments. If a Christian-name, or date or sum is mis-stated in the petition, instead of amending by erasure or interlineation, an amendment can be added at foot of, or endorsed on, the petition; something in this form:—"Your petitioner, by way of amendment, sheweth that the name 'John Jones,' in the petition mentioned, should be 'William Jones'; or, 'the date of the 1st February 1850,' should be '1st July 1850; ' or, 'the sum £400 should be £500,'" &c.

1850.  
Rolls.  
GRAVES  
v.  
HOLLAND.  
Judgment.

1850.  
Rolls.  
GRAVES  
v.  
HOLLAND.  
Judgment.

It appears to me that I should no more be justified in allowing a petition to be amended by erasure or interlineation, where it is verified by a short form of affidavit underwritten or annexed, than I should be justified in allowing an answer, or a charge or discharge, to be amended. The same principle is applicable to both. The proper course, therefore, in my opinion, in this case is, to allow the petitioner to state at the foot of the petition, and independently of it, the matter which he wishes to be introduced by way of amendment. I do not see any necessity in the present case to order the amendment to be verified, at least at this stage of the proceeding.

Let the petitioner be at liberty to amend the petition in this matter, without in any manner altering, erasing or interlining the said petition, as now verified, by stating by way of amendment at foot of the said petition, after the affidavit to verify, or by endorsement thereon, the said amendments upon which the Registrar has endorsed his name; and let the date of such amendment be stated at the heading thereof; and let the Deputy Keeper of the Rolls place in the margin of such amendments a new title to the cause petition in accordance with said amendments; and let the petitioner abide his own costs of this motion, and also abide all costs which may be incurred in making such amendments.

*Rolls Motion Book, 302, fol. 299, 1850.*

1850.  
Rolls.

## LONG and Wife v. TOTTENHAM.

Nov. 8, 18.  
Dec. 2.

THE plaintiff Major Long, when the bill and the answer of the defendant were filed, was an officer on full pay and abroad on service. On the 20th of June 1850, he went on half-pay, and it appeared by an affidavit of the defendant, filed after the motion was made, that he was aware of the fact from the "Gazette" on the 25th of June. On the 17th of September 1850, a replication was filed. The defendant's affidavit stated, that in the intervening time his solicitor was ill and unable to attend to business, and had left Ireland in bad health on the 18th of September. On the 8th of October the defendant called on the plaintiff by notice to give security for costs, and on the 29th of October he served notice of an application, that the proceedings should be stayed until security was given.

An officer on half-pay resident abroad is not privileged from giving security for costs.

When a plaintiff becomes liable to give security for costs, after answer, the filing of the replication will not preclude the defendant from obtaining the order.

The defendant became aware of the plaintiff's liability to give security for costs on the 25th of June, but did not serve notice of motion until the 29th of October. *Held*, not too late.

But *semble*, the notice should be served before the time for answering has expired, if it expire in the Vacation.

The cases and practice as to security for costs considered.

Form of the order.

Mr. S. B. Miller, for the defendant, moved accordingly.

Mr. Gayer, for the plaintiff, resisted the motion on three grounds:—First, that the plaintiff was privileged, although he had gone on half-pay, as he was still in the service, and liable to be called on at any time: *Powell v. Bernard* (a). Secondly, that the filing of the replication was a step taken in the cause, which precluded the plaintiff. Thirdly, that the defendant had been guilty of laches and should have served notice of his motion sooner: *Executors of Robinson v. Bradley* (b); *Watson v. Pim* (c); *Foster v. Eyres* (d); *Nolan v. French* (e); *Freel v. Trant* (f).

Mr. Miller, in reply, cited *Burke v. Botham* (g); *Evelyn v. Chippendale* (h).

- (a) 1 Hog. 144.
- (c) 2 Ir. Eq. Rep. 26.
- (e) 10 Ir. Eq. Rep. 211.
- (g) 2 Beav. 537.

- (b) 4 Law Rec. N. S. 9.
- (d) 7 Ir. Eq. Rep. 638.
- (f) 11 Ir. Eq. Rep. 278.
- (h) 9 Sim. 497.

1850.

Rolls.

LONG

v.

TOTTEN-

HAM.

Dec. 2.Judgment.

His Honor, as to the first point made by the plaintiff, viz., that he was privileged, was of opinion that the privilege did not extend to officers on half-pay, whose absence abroad was voluntary, and not required for the public service.

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The MASTER OF THE ROLLS.

In this case a motion has been made on the part of the defendant that the plaintiff resident out of the jurisdiction should give security for costs.

The plaintiff Mr. Long was an officer on full pay, when the bill was filed, and therefore not bound to give security for costs. On the 20th of June 1850, he went on half-pay. On the 25th of June the defendant was aware that Mr. Long had gone on half-pay. On the 17th of September the plaintiff's replication was filed; and notice thereof was given to the defendant on the following day. On the 18th of September, the defendant's solicitor left Ireland in ill health. On the 8th of October a notice was served on the plaintiff's solicitor, that if security for costs was not given, an application would be made to the Court. On the 29th of October, the present notice of motion was served.

It is insisted on the part of the plaintiff that the motion cannot be sustained—first, on the ground that an officer on half pay is privileged from giving security for costs; secondly, that the plaintiff having taken a step in the cause by filing a replication on the 17th of September, the application is late; thirdly, that the defendant should have applied sooner.

As to the first objection, I stated, when the case was argued, that an officer on half-pay, whose residence abroad was voluntary, was not, in my opinion, privileged from giving security for costs.

As to the second point, it has been decided in England, that in, order to entitle a defendant to require security for costs from the plaintiff, he must make his application at the earliest possible time after the fact has come to his knowledge, and before he takes a further step in the cause. The cases on this subject are collected in the last edition of *Daniel's Chancery Practice*, vol. 1, pp. 30, 31.

The taking of a step by the plaintiff has not been held in any

English case to deprive the defendant of the right to require security. On principle it would be very unjust to establish such a rule. According to the plaintiff's argument, if the replication had been filed on the 27th of June, that is within a day or two after the defendant was aware that the plaintiff Mr. Long had gone on half-pay, the application should not have been made.

1850.  
Rolls.  
—  
LONG  
v.  
TOTTON-  
HAM.  
—  
Judgment.

The case of *Robinson v. Bradley* (*a*), relied on by the plaintiff, is no authority for the proposition. In that case it was decided, that if a defendant served commissioners' names upon the plaintiff, and the latter returned them with a consent approving of them ; or if a defendant neglected to file his answer in two months, and was served with the month's notice under the 25th of the General Orders then in force, he lost his right to call on the plaintiff, who was resident out of the jurisdiction, to give security for costs, the fact having been previously within the defendant's knowledge.

In *Watson v. Pim* (*b*) the month's notice to press was served on the 29th of April 1839 ; and the defendant, instead of questioning the right of the plaintiffs to proceed, without giving security for costs, furnished to the plaintiff's solicitor a further account, which was deemed unsatisfactory, and did not move until the following Michaelmas Term.

In the case of *Nolan v. French* (*c*) the application was made after the time for answering had expired. In the three last mentioned cases the motion was refused, on the ground that a defendant, who has allowed the time for answering to expire, is to be considered as if in contempt, and cannot afterwards move that security for costs should be given, if he was aware that the plaintiff was out of the jurisdiction. The same observation applies to the case of *Freel v. Trant* (*d*).

In the case of *Foster v. Eyres* (*e*), the plaintiff obtained a conditional order for an injunction on the 15th of February. On the 1st of March the defendant appeared. On the 17th of March the

(*a*) 4 Law Rec. N. S. 9.

(*b*) 2 Ir. Eq. Rep. 8.

(*c*) 10 Ir. Eq. Rep. 211.

(*d*) 11 Ir. Eq. Rep. 278.

(*e*) 7 Ir. Eq. Rep. 638.

1850.

*Rolls.*LONG  
v.TOTTE-  
HAM.

plaintiff served notice on the defendant to make the conditional order absolute, and the defendant allowed it to be made absolute; and the late Master of the Rolls considered that making the order absolute on notice to the defendant disentitled the defendant to require security for costs. That case goes further than any case in England; but it only decides that, where the plaintiff gives notice of an adverse motion, and obtains an order on notice to the defendant, the step taken by the plaintiff, to which the defendant is thus a party, precludes the defendant from moving for such security. It could not have been held that the step, taken by the plaintiff, of obtaining and serving the conditional order could, without more, have barred the defendant of his right to move.

None of these cases, however, establish, that the filing of a replication is to deprive the defendant of his right to move for security; and I am of opinion that that step is not sufficient to deprive the defendant of his right to move.

The third question is, whether the defendant is prevented by lapse of time from making the application? I put out of consideration in this case the illness of the defendant's solicitor. Such a circumstance would involve too much uncertainty in the rule. Without, however, considering that matter, it appears to me that the application was in time.

The last day for serving notice in Trinity Term was the 12th of June. The fact of the plaintiff having gone on half-pay came to the defendant's knowledge on the 25th of June. On the 8th of October he required security, and on the 29th of October notice of the motion was served, and the notice was in the Vacation list of this Term. The motion was therefore moved at the earliest period at which it could have been moved, without the special leave of the Court. If the time for answering is about to expire in Vacation, notice must be served before the expiration of such time. But that practice is founded on a different principle—viz., that the notice must not be served when a party is, as it were, in contempt.

There is no case, however, independently of the rule last mentioned, which decides that a defendant loses his right by not serving his notice at one period of a Vacation instead of another, where the

notice must be to move in the following Term, no matter at what period of the Vacation it is served.

None of the cases go the length which I am called upon to go in this case; and I am of opinion upon the whole that the plaintiff should give security for costs.

1850.  
*Rolls.*  
 LONG  
 v.  
 TOTTEN-  
 HAM.

Be it so, and accordingly refer it to J. J. Murphy, Esq., the Master in this cause, to measure the amount of such security, and to approve of two sufficient sureties to enter into security by recognizance before said Master, or before a Master Extraordinary in the country, to be first approved of by the said Master, conditioned for payment of such costs, if any, as may be awarded to the defendant against the plaintiffs in this cause; and upon such security being so measured, let the plaintiff be at liberty, if he shall so think fit, instead of entering into security by recognizance as aforesaid, to transfer to the credit of this cause, with the approbation of said Master and privy of the Accountant-General, so much Government £3½ per cent. stock as will be equivalent to the amount of such security; and upon such stock being so transferred as aforesaid, let the said Accountant-General draw on the Bank of Ireland from time to time in favour of the said plaintiff, or of their attorney thereto lawfully authorised, for the dividends to accrue due on said stock; and let the costs of this motion be costs in the cause.

*Rolls Motion Book, 303, fol. 73, 1850.*

1850.

Chancery.

## SPRING v. STEPHENSON.

(Chancery.)

Nov. 8, 20.

Devise of JOHN UPTON the elder, being entitled to the lands of Ashgrove under Blackacre, subject to the debts of testator, to trustees upon trust, out of the "rents" and "issues," to pay to his three nieces a sum of £1000 at twenty-one or marriage, whichever should first happen, with interest from the period of his death; and in case they should all die before twenty-one or marriage, he gave that sum to his nephew. The testator next bequeathed certain annuities, which he directed to be paid out of the "rents, issues and profits" of Blackacre, and gave the annuitants powers of distress and entry. He next devised ("after payment of the legacies and bequests aforesaid") Blackacre, and all other his real and personal estate, subject to payment of his debts, legacies, &c., to the same trustees upon trust to pay £40 annually for the maintenance of his nephew during minority, and directed the investment during that time of the surplus "rents, issues, proceeds and profits," such surplus to be paid over to him on his attaining twenty-one; from which time the testator directed the trustees to permit his nephew during his life to receive the "rents, issues and profits" of Blackacre, and the other real and personal estate, with power to jointure, and with remainder over in strict settlement to his (the nephew's) issue.

At the date of the will the nephew was nineteen years of age, and the nieces were respectively sixteen, twelve and ten years of age. The testator left personality to the value of £800. Held, that the sum of £1000, bequeathed to the nieces, might be raised by sale of Blackacre, and was not charged upon the annual rents only.

\* Sic in the original will, which was very inaccurately penned.

alike; and if but one, then the same to be paid to such survivor at the time aforesaid; and in case they should all happen to die before twenty-one or marriage, then upon trust for their brother (the testator's nephew) John Upton the younger. The testator then directed the trustees to pay or permit Edward Upton to receive out of the rents, issues and profits of Ashgrove an annuity of £40 (by a codicil reduced to £30 per annum) during his life, with powers of distress and right of entry to secure same. He next bequeathed an annuity of £10, upon certain conditions, to Catherine Lyons for life, also to be paid out of the rents, issues and profits of Ashgrove, with similar powers of distress and entry. The testator next devised, "after payment of the said legacies and bequests as aforesaid," the same lands of Ashgrove, and all other the real and personal estate of which he should be seized or possessed at his decease, subject, nevertheless, to the payment of his just debts, legacies and funeral expenses, to the same trustees, to pay £40 annually for the clothing, maintenance and education of his nephew John Upton the younger during his minority; and after payment of all debts, legacies and bequests, to put and place the rents, issues, proceeds and profits thereof, until John Upton the younger should attain twenty-one years, at interest, either in some public stock or fund, or else upon one or more good and sufficient security, either real or personal, as the trustees should think fit; and on John Upton the younger attaining twenty-one years, to pay to him the surplus monies so saved during his minority, and to permit him to receive the rents, issues and profits of the lands of Ashgrove, and of the testator's other real and personal estate during his life, with a power to grant a jointure of £100 per annum; and on the determination of that estate, upon trust for the first and other sons of John Upton the younger successively in tail; and in default of issue male of John Upton the younger, with remainder to the testator's nephew William Stephenson, and his heirs for ever, subject to the payment of £1000 for the issue female, if more than one, of John Upton the younger as should be living at his decease; and if but one, the sum of £600 for such only child. The will concluded with some small bequests and the appointment of executors.

1850.  
Chancery.  
SPRING  
v.  
STEPHENSON.  
—  
Statement.

1850.

Chancery.SPRINGv.STEPHENSON.Statement.

The testator John Upton the elder died in the month of October 1837, leaving personal estate of the value of £800. At the date of the will John Upton the younger was about nineteen years of age, and the testator's nieces Elizabeth, Catherine and Frances were about sixteen, twelve and ten years of age respectively.

Objections were raised to the structure of this suit, principally resting upon the ground of misjoinder, but depending upon a state of facts too complicated to justify their introduction into this report beyond the allusion made to them in the judgment of the Court. The chief question in the cause was whether the legacy of £1000 to Elizabeth, Catherine and Frances Upton, the three nieces of the testator, could be raised by a sale of his real estate? or whether the annual rents and profits only of that estate were liable to the payment of the legacy?

Argument.

*The Solicitor-General*, Mr. Christian and Mr. Robert Ferguson, for the plaintiffs.

A charge of debts or legacies upon the rents, issues and profits of lands carries with it a right to the sale of the lands in payment of the debts or legacies: *Berry v. Ashham* (a). In *Green v. Belcher* (b) Lord Hardwicke lays down the rule thus:—"Where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning and to confine them to the receipt of rents and profits as they accrue, the Court, in order to obtain the end which the party intended by raising the money, has, by the liberal construction of these words, taken them to amount to a direction to sell; and as a devise of rents and profits will at law pass the lands, the raising by rents and profits is the same as raising by sale." His Lordship's observations in *Baines v. Dixon* (c), and those of Lord Thurlow in *Shrewsbury v. Shrewsbury* (d) are to the same effect. In *Bootle v. Blundell* (e) Lord Eldon treated it as a settled rule, that where a term is created for the purpose of raising money out of the rents and profits, if the trusts of the will require that a gross

(a) 2 Ver. 26.

(b) 1 Atk. 505.

(c) 1 Ves. sen. 42.

(d) 1 Ves. jun. 234.

(e) 1 Mer. 233.

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sum should be raised, the expression "rents and profits" will not confine the power to the mere annual rents, but the trustees are to raise it out of the estate itself by sale or mortgage. In *Sheldon v. Dormer* (*a*), where there was a trust for raising portions payable at eighteen or marriage out of rents or profits, the same rule prevailed; Lord Somers saying that in the case of a will where an estate is charged with the raising of a sum of money, though it be by rents and profits, there the Court has frequently decreed sales, and that the case before him was stronger than many of those cases, because there was a time prefixed for the raising of the portion, which could not be done by annual rents and profits within the time limited. Lord Chancellor Parker made a similar decision in *Traf- ford v. Ashton* (*b*), although the trust was that the portions should be raised for the daughters, to be paid them as soon as conveniently could be, without limiting any express time when the portions should be payable; and his Lordship there took a distinction between "profits" and "yearly profits." And in *Allan v. Back- house* (*c*), where a testator, devising leasehold estates, held under a bishop's lease, directed that the renewal fines should be raised out of the rents and profits, Sir Thomas Plumer held that the fines might be raised by mortgage or by a sale of part of the estates. Here there is a time fixed for payment, viz., twenty-one or marriage, and an intermediate gift and interest at £6 per cent. The direction to pay the annuities of £40 and £10 out of the rents, issues and profits, will probably be relied on as restraining the meaning of "rents, issues" to annual income; but in *Okeden v. Okeden* (*d*) such a circumstance was not deemed sufficient to vary the rule of construction. The Court will take into consideration collateral circumstances which throw light upon a will. Here the devisee of the estates, John Upton the younger, was about ten years of age at the date of the will: *Lowe v. Lord Huntingtower* (*e*). The testator never could have supposed that the legacy could have been raised and the outgoings of the property met by the annual income

(*a*) 2 Ver. 310.

(*b*) 1 P. Wms. 415.

(*c*) 2 V. & B. 65.

(*d*) 1 Atk. 550.

(*e*) 4 Rus. 532, n.

1850.  
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in two years. The cases of *Farmer v. Mills* (a), *Gibson v. Rogers* (b), *Wroughton v. Colquhoun* (c), and *Gibson v. Lord Montfort* (d), were also referred to.

*Argument.*

**Mr. Kane** and **Mr. Leech**, contra.

Almost all the cases cited for the purpose of showing that this legacy of £1000 should be raised by sale of the lands arose in reference to portions, and not to legacies. Here there was not any moral obligation upon the testator to provide for his nieces. In *Allan v. Backhouse* (e), in order to save the estate, the Court was forced to put a strained construction upon the words "rents and profits." In *Evelyn v. Evelyn* (f) the Court held that the portions should be raised by perception of rents and profits only, and relied in some measure upon the extreme youth of the daughters; a circumstance existing here also. A similar ruling was made in *Mills v. Banks* (g).

Even supposing (what we do not admit) the rule to be that "rents and profits" do not *prima facie* mean "annual rents and profits," yet such is the construction put upon the will where the testator treats the estate as existing entire after raising the legacy: *Wilson v. Halliley* (h); *Small v. Wing* (i); *Foster v. Smith* (k); *Taylor v. Emerson* (l). Here the testator so treats it, and charges upon it annuities, which he directs to be paid in the same manner in which the £1000 legacy is to be paid, viz., out of the rents. He contemplates the existence of a residue of the rents and profits, and directs that it shall be paid over to his nephew John Upton; this fact, coupled with that of the annuities being included in the charge upon the rents, has been held sufficient to show that the charge can be raised by perception of rents only: *Heneage v. Lord Andover* (m). The limitation over of the £1000

(a) 4 Russ. 86.

(b) Ambl. 93.

(c) 1 De Gr. & Sm. 36.

(d) 1 Ves. sen. 490.

(e) 2 V. & B. 65.

(f) 2 P. Wms. 659.

(g) 3 P. Wms. 1.

(h) 1 R. & Myl. 590.

(i) 3 Bro. P. C. Toml. ed. 66.

(k) 1 Phil. 629.

(l) 4 Dru. & War. 117.

(m) 10 Price, 230; S. C. 3 Y. & Jer. 360.

legacy absolutely to John Upton the younger, in case his sisters should all die before twenty-one or marriage, is of value as an indication of the testator's intention, because he here limits the legacy over to the tenant for life of the lands, who would principally suffer by the raising of the legacy out of the rents, and gives no interest in it to the tenant in tail. The power to charge Ashgrove with a jointure of £100 per annum supposes that those lands will be forthcoming for the purpose. The testator has drawn throughout his will a marked distinction between Ashgrove and his other lands; the former he manifests a strong anxiety to preserve in his name and family; a circumstance in *Evelyn v. Evelyn* upon which Lord Raymond much relied. Counsel also mentioned *Corbett v. Maydwell* (a); *Conyngham v. Conyngham* (b); *Codrington v. Foley* (c); *Stone v. Theed* (d), and *Earl of Shaftesbury v. Duke of Marlborough* (e).

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*Chancery.*  
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 v.  
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 —  
*Argument.*

#### The LORD CHANCELLOR.

Nov. 20.  
*Judgment.*

The bill in this case was filed to raise a legacy of £1000 charged upon the lands of Ashgrove by the will of John Upton the elder, and, if necessary, for an account of his personal estate, and of his debts, legacies and funeral and testamentary expenses, and by whom and with whose money the same or any part thereof had been paid.

As to the first question raised—namely, that of misjoinder of the plaintiffs in respect to the legacy of £1000, *Anderson v. Wallis* (f) was cited for the defendants, but I do not think it applicable to the present case, which seems to me to fall within the authority of *Buckeridge v. Glasse* (g), where Lord Cottenham says, p. 136:—“I am not prepared to hold that the principle that parties, though entitled to relief upon the merits, cannot obtain it in a suit in which they are associated with co-plaintiffs who are not so entitled, ought to be so extended as to make it necessary that every plaintiff should

(a) 1 Salk. 159; S. C. 2 Vern. 640; Eq. Cas. Ab. 337, pl. 5; 3 Chan. Rep. 191.

(b) 1 Ves. sen. 522.

(c) 6 Ves. 364.

(d) 2 Bro. C. C. 242.

(e) 2 M. & K. 111.

(f) 4 Y. & C. Exch. 336, affd. 1 Phil. 202.

(g) Cr. & Phil. 126.

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be interested in and entitled to every part of the relief. Such an extension would create great multiplicity of suits." Here, although the plaintiffs are not in an equal degree interested in the legacy of £1000, yet, on perusal of all the deeds, they seem to me to have such a common interest as to entitle them to maintain this suit in that respect. That disposes so far of the question regarding the structure of the suit.

The main question was, whether the legacy of £1000 was raisable out of the annual rents and profits only, or whether it might be raised by sale of the lands? The words of the bequest are as follows:—[His Lordship here read the bequest and several of the succeeding passages in the will.]

The scope of the will, as regards the sum of £1000, is in itself plain enough, and except there be a difference as to the mode of raising, does not differ from the ordinary charge of a portion payable at twenty-one or marriage, with interest in the meantime; that is to say, in other words, that until the portion be wanted, interest should be payable, but when wanted, that it should be raised. Then comes the question, how is it to be raised? I do not think it necessary to go in detail through the older authorities upon this subject, which are collected and commented on in *Allan v. Backhouse* (a), by Sir Thomas Plumer, V. C. That case differed from the present case as to the nature of the purpose for which the money was to be raised, which there was for the payment of renewal fines, but in other respects it bears strongly on this case. Sir Thomas Plumer says:—"In construing the words 'rents and profits' in a will to amount to a power to raise a gross sum of money, the occasion on which the necessity of providing that sum would arise must be observed. The time cannot be known with certainty, depending on a contingency." So here too the time cannot be known with certainty. Again, he says:—"Whatever might have been the interpretation of these words [rents and profits], had the case been new, whatever doubt might have arisen upon them as denoting annual or permanent profits, it is now too late to speculate, this Court having by a technical, artificial, but liberal, construction

(a) 2 V. & B. 65.

in a series of authorities admitting it not to be the natural meaning, extended those words, when applied to the object of raising a gross sum at a fixed time when it must be raised and paid without delay, to a power to raise by sale or mortgage, unless restrained by other words." The object in *Trafford v. Ashton* (a) was to raise portions, and it is a stronger authority than *Allan v. Backhouse*, because the raising of renewal fines is absolutely necessary to preserve the estate. Here the first question is, what is the testator's intention as to the time for raising the portions? The testator's nephew, John Upton the younger, was at the date of the will about nineteen years of age; the three nieces to whom he bequeathed the £1000 were of more tender years, but within no very long time after the testator's death the whole sum might have become payable had the two younger nieces died under twenty-one; by the clause of survivorship the eldest would have taken the whole, and she may have married several years before attaining twenty-one, and upon her marriage would have been entitled to payment. It is scarcely possible to suppose that the testator intended any thing else than that the portions should be forthcoming at the marriage of the legatees.

There are certainly ingredients for doubt in the direction to pay the annuities out of the rents, issues and profits. But it is unquestionable that if the £1000 were raised out of the yearly rents and profits, the whole income would have been absorbed. Again, how is the £6 per cent. interest on the £1000 to be provided for if the principal is to be raised out of the rents only? It appears to me that the will imported that the portions are to be raised at twenty-one or marriage, and provided for payment of interest until one or other of those periods arrived. It is difficult to reconcile the whole of the will with this construction; but though not without doubt, yet I think that this sum is a charge upon the corpus of the estate, and that the parties deriving under the legatees are not driven to fall back upon the annual rents received by the tenant for life during his life. I have not found any case in which a fixed time was appointed, that the raising of the sum had to wait for the perception

1850.  
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—  
Judgment.

(a) 1 P. Wms. 415.

1850.  
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of rents and profits. In *Evelyn v. Evelyn* (a), *The Earl of Rivers v. Lord Derby* (b), *Heneage v. Lord Andover* (c), and *Ivie v. Gilbert* (d), there was not any time limited for payment; and in *Evelyn v. Evelyn* that circumstance is much relied on. On these grounds I cannot distinguish this case in principle from *Allan v. Backhouse*, and therefore think that the plaintiffs are entitled to the relief they seek with reference to the £1000 charge.

With regard to the rentcharge, I shall not give any specific direction, it not appearing that any thing was due on foot of it at the time of filing the bill. As to the debts alleged to have been paid off by the tenant for life, I think that the bill ought to be dismissed. A great deal of expense has been caused in this suit by reason of its not having been confined to the raising of the £1000. I must direct the plaintiffs to pay the costs incurred in respect of the rentcharge and the debts.

1 *Reg. Lib. Gen.* fol. 19, 61.

(a) 2 P. Wms. 659.

(b) 2 Vern. 72.

(c) 10 Price, 230; S. C. 3 Y. & Jer. 360.

(d) 2 P. Wms. 13; S. C. Prec. Chan. 583; 2 Bro. P. C. 463.



### FINUCANE v. STUDDERT.

Dec. 3, 4.

A testator devised lands to A for life, remainder to his sons successively in tail, By will bearing date the 10th of April 1818, Thomas Steele of Cullane Castle, in the county of Clare, devised to trustees considerable real estates upon trust for his nephew Thomas Steele for life, remainder to B for life, remainder to his sons successively in tail, remainder to testator's nieces C and D, and the survivor, for their respective lives as tenants in common; he also bequeathed to D a sum of £1000, charged upon his real and personal estate, to be by her distributed among her younger children in such shares as she should think proper, provided always that if D should under the foregoing limitations in the will get into possession of the lands, then the said sum of £1000 should not be paid unto her for the purpose aforesaid. D survived the testator, but died, her life estate in remainder in the lands never having taken effect in possession.

*Held*, that she took a vested interest in the legacy of £1000 at the death of the testator, subject to be divested on the happening of the contingency, and accordingly that interest was payable upon the legacy from the testator's decease.

remainder to his first and other sons successively in tail, with remainder to his daughters as tenants in common in tail, with remainder to Thomas O'Halloran for life, with remainder to his first and other sons successively in tail, with remainder to testator's nieces Mary M'Mahon and Barbara Carmody, and the survivor of them, for their respective lives as tenants in common, with remainder over. The will also contained the following bequest:—"I give and bequeath to my niece Barbara Carmody the sum of £1000, to be by her distributed to and among her younger children in such shares and portions as she shall think proper. Provided always, and my will is, that if the said Barbara Carmody shall, under the limitations of this my will, get into the possession of the lands hereinbefore mentioned, then and in such case the said sum of £1000 shall not be paid unto her for the purpose aforesaid." The will also charged the real estate as well as the personal estate with payment of the legacies given by the testator.

The testator died in the year 1821. Barbara Carmody died on the 3rd of February 1847, the real estates never having become vested in her in possession.

This cause now came before the Court upon report unexcepted to and for further directions. The report found that the persons entitled under Barbara Carmody to the legacy of £1000 were entitled to interest from the year 1827, up to which time it had been paid from the death of the testator by retention of rents.

Mr. *Francis Fitzgerald* and Mr. *W. W. Brereton*, for the defendant, the present tenant in tail of the real estates.

*Argument.*

To an error in law patent on the report an objection may be taken at the hearing, although no exception has been filed: *Adams v. Claxton* (a). Such an error exists with reference to the interest upon the legacy, which only vested at the death of Barbara Carmody in 1847, and can therefore bear interest from that time only; until her death the legacy was contingent, because until then it was uncertain whether or not the real estates would ever vest in her in possession. Even where the legacy is payable out of personal

(a) 6 Ves. 226.

1850.  
*Chancery.*  
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 —  
*Statement.*

1850.

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estate only if the period of payment be deferred until an event which may or may not happen, the effect is to render the legacy contingent: *Athins v. Hiccocks* (*a*). That rule is much stronger when applied to a legacy charged upon real estate: *Pawlett v. Pawlett* (*b*). *Dies incertus conditionem in testamento facit.*

**Mr. H. O'Hara**, for the executrix and children of Barbara Carmody.

This legacy was vested in Barbara Carmody at the death of the testator, subject to be divested on her succeeding to the real estates. The Court would have paid out such a legacy to her in her lifetime without security, if it had been given to her absolutely: *Griffiths v. Smith* (*c*); *Fawkes v. Gray* (*d*). The Court will, from the language of the bequest, imply a life interest in the legacy to Barbara Carmody. In *Acheson v. Fair* (*e*), Sir Edward Sugden observed, that if a testator give an estate to a man to dispose of to others, and they would only take in default of appointment by implication, and there are words giving the estate to the donee of the power, it is a very fair implication to give him an estate for life. Barbara Carmody therefore took a vested interest in the legacy, subject to be divested on the happening of the contingency, with a power of appointment amongst her children, and in default of appointment they took equal shares at her death, inasmuch as the Court implies a gift to children where there is a mere power of distribution amongst them given by the will: *Burrough v. Philcox* (*f*).

**Mr. W. W. Brereton**, in reply.

In *Raven v. Waite* (*g*), and in *Pett v. Fellowes* (*h*), it is laid down that legacies do not of their own nature carry interest until default is made in payment, and if made payable at a future day

(*a*) 1 Atk. 500.

(*b*) 1 Vern. 321, Raithby's ed.; S. C. 2 Ventris, 366.

(*c*) 1 Ves. jun. 97.

(*d*) 18 Ves. 131.

(*e*) 3 Dr. & War. 512, 527.

(*f*) 5 My. & Cr. 73.

(*g*) 1 Swan. 553.

(*h*) 1 Swan. 561, n.

that they carry interest from such time of payment. A charge upon land payable at a future day does not vest until the time of payment: *Phipps v. Lord Mulgrave* (*a*). A legacy charged upon real estate, and payable at a future day, sinks, as to the real estate, by the death of the legatee before the time of payment: *Pearce v. Loman* (*b*); and the rule is the same where a legacy is given first out of the personal estate; and if that be not sufficient, then out of the real estate: *Duke of Chandos v. Talbot* (*c*). The contingency here being annexed to the substance of the gift, and payment being postponed from circumstances personal to the legatee, and not for the convenience of the estate, the legacy was plainly contingent until the death of Barbara Carmody: *Butler's Fearne*, 9th ed., p. 556, *note*.

The case of *Pinbury v. Elkin* (*d*) was also mentioned.

#### The LORD CHANCELLOR.

I am inclined to think that this legacy vested at the death of the testator Thomas Steele, but was liable to be divested on the occurrence of an event which has not happened. I shall look into the authorities. A question might arise as to whether the children took an interest or not.

Mr. O'Hara said that it would not be necessary to consider that question, as the children would at all events take as the next-of-kin of Barbara Carmody.

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#### The LORD CHANCELLOR.

I think that this is a plain case, and must be governed by the decisions in *Griffiths v. Smith* (*e*) and *Fawkes v. Gray* (*f*), which show that where a legacy is vested, and the time for payment is arrived, although it is made defeasible upon a subsequent contingency—viz., the legatee's succeeding to certain real estates, he will

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 Chancery.  
 FINUCANE  
 v.  
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 —  
 Argument.

- (*a*) 3 Ves. 613.
- (*c*) 2 P. Wms. 610, 611.
- (*e*) 1 Ves. jun. 97.

- (*b*) 3 Ves. 135.
- (*d*) 1 P. Wms. 563.
- (*f*) 18 Ves. 181.

Dec. 4.  
 Judgment.

1850.

Chancery.  
FINUCANE  
v.  
STUDDEBT.Judgment.

be entitled to his legacy without giving security to refund ; for the Court cannot keep it to await the event. I cannot see any grounds in the language of the gift to Barbara Carmody which distinguish this case from those referred to ; nor do I perceive any solid ground of difference in this respect between legacies charged on real estate and those not so charged, as these cases were not decided merely on the ground that the legacies were vested, but that the time of payment had arrived. Here there is not any time fixed for payment ; the language therefore imports that it might be paid immediately. It would be hard to hold otherwise, for in that case no benefit might result to the legatee Barbara Carmody during her life ; against such a construction this Court would and ought to struggle as much as possible. It would not be a natural construction ; it is more natural to say that the legacy was intended to be vested immediately upon the death of the testator, subject to be divested on the happening of the event during the lifetime of Barbara Carmody. This appears to have been the construction put upon it in the Master's office, and is in conformity with *Griffiths v. Smith* and *Fawkes v. Gray*. The contingency annexed by the testator to a legacy in *Colhoun v. Thompson* (a) resembles that in the present case ; but the contingency there was mixed up with the words of the gift, and it became a question of construction as to the time when the legacy was payable. A father reciting by will that lands were by his marriage articles settled on his son, and failing him and his issue on his (the testator's) daughters, declared that in case his daughters, or either of them, should become entitled to the lands in the event of the son dying without issue, she or they so becoming entitled should not have, possess or enjoy any part of his property. But in case the daughters should not become entitled to the lands, he bequeathed a legacy to each ; and in case the daughters should die under twenty-one or marry without consent, the legacy of her so dying or marrying should go to the survivor. Sir A. Hart held that a daughter marrying after the testator's death, with consent, and attaining twenty-one, was entitled to the legacy, although she subsequently became entitled to the lands on the death of the son and his issue. He thought that

(a) Beatty, 242.

the contingency there must be necessarily referred either to the event of the son dying without issue before the testator, or to the time when the portions would be payable, if a time of payment were prescribed by the will, or if it could be collected from necessary implication. He thought that the gift over of the legacies of daughters dying before twenty-one or marriage, with consent, afforded sufficient implication that the testator intended each daughter attaining twenty-one or marriage, with consent, to become immediately entitled to her legacy. Both *Griffiths v. Smith* and *Fawkes v. Gray* were cited upon that occasion. The view which I take of the present case is, that the legacy was vested on the death of the testator, and that the time for payment of it had then arrived, and that accordingly the persons now representing the legatee are entitled to interest from that period. Their costs must be paid by the inheritor, who brought them here with the hope of exonerating his estate from the interest. The costs may be added to the amount of the demand.

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Chancery.  
FINUCANE  
v.  
STUDDERT.

Judgment.

1851.

Chancery.Feb. 15.

The Court will review the exercise of the Master's discretion in reports under the 145th and 146th General Orders; and it is the duty of the Court to consider both the state of the property and the interests of the parties.

*Sensible*—The Court has not jurisdiction, in opposition to the wish of the inheritor, to discharge solvent tenants, by means of an ejectment for non-payment of rent, from their covenants to pay rent.

Statement.

In this case a receiver had been appointed over the defendant's estates; and the Master, in a report under the 145th and 146th General Orders, found *inter alia* "That David O'Kelly held jointly with his son David O'Kelly, jun., under a lease for thirty-one years, &c., and that he had been lately discharged as an insolvent; and that the said lands should be taken up upon the terms of David O'Kelly, jun., paying the arrears of rent; and that in the event of his declining to pay such arrears, proceedings by ejectment should be taken."

The lease contained joint and several covenants by the O'Kellys to pay the rent; and it appeared from the receiver's sworn statement of facts that David O'Kelly, jun., was solvent.

To the above report the defendant excepted, on the ground that the Master ought to have directed an action upon the covenant against David O'Kelly, jun.

The case was first argued before his Honour the Master of the Rolls, who, intimating an opinion that the Court had not jurisdiction, in opposition to the inheritor, to evict a lease where the rent was secured by the covenant of a party alleged to be solvent, gave the defendant leave to bring an action. From this order David O'Kelly, jun., appealed.

Argument.

Mr. Brewster and Mr. Sherlock, for David O'Kelly, jun.

Mr. R. R. Warren, for the defendant.

Mr. Chatterton, for the receiver.

The LORD CHANCELLOR.

*Judgment.* I do not see how I can relieve the appellant from his covenant.

It has been contended that the decision of the Master upon an inquiry of this kind is final; but certainly this is not so, and the Master's discretion is subject to review. It is my duty to look to the expediency of what the Master has directed, and to consider not only the state of the property, but also the rights of the parties. In minor and lunacy matters the Court has a wider discretion with regard to tenants than in adverse suits. Where an inheritor resists it, the Court ought not to compel him to forego rent which is due to his estate. Viewing the case with regard to expediency, how can it be said to be expedient that an ejectment for non-payment of rent should be brought, and the tenant exonerated from his covenants, where that tenant is solvent? This is not my notion of expediency. The case might be otherwise if no person but Mr. O'Kelly, sen., were concerned. And were my opinion upon that point different from what it is, I could not take from the inheritor his property upon any notion of expediency which I might entertain. The order of the Master of the Rolls must be affirmed, and, though it is a hard case, with costs. The receiver is not entitled to any costs.

NOTE.—*Vide Hone v. Lord Langford* (Dru. Rep. 328.)

1851.  
Chancery.  
HUTCHINS  
v.  
HUTCHINS.  
Judgment.

1850.

*Rolls.*

## HUNTER v. KENNEDY.

WALLACE, *Petitioner*; KENNEDY, *Respondent*.*June 3.  
July 22.*

(In the Rolls.)

H. K., by an unregistered deed, granted a rentcharge to his daughter. By the daughter's marriage settlement, executed on the following day, to which H. K. was a party, and which recited the grant, the rentcharge was conveyed by the daughter to trustees. The latter deed was registered. H. K. afterwards mortgaged the land, out of which the rentcharge issued, by a deed, which was also registered. Held, that the rentcharge, though granted by an unregistered deed, had priority over the mortgage, by reason of the registration of the settlement.

AN order was made in this cause and matter, bearing date the 28th of June 1848, whereby it was referred to the Master to inquire and report whether the sum of £1400 was justly and fairly due on foot of the annuity of £100, under the deed bearing date the 18th of July 1831, and that the defendant Hugh Kennedy should be at liberty to rely upon the Statute of Limitations, upon the said reference; and also, that the Master should inquire and report the relative priority of the demands of the plaintiffs and the petitioner.

The Master made his report under the said order, and found that the sum of £1400 was not due on foot of the annuity of £100 under the said deed of the 18th of July 1831; but that the sum of £600, being six years' arrears of the said annuity, up to the 1st of November 1846, the gale day next before the filing of the bill, together with the arrears which fell due since that day, up to and for the 1st of May 1850, and amounting to £350, making together the sum of £950, were due on foot of the said annuity; and the Master further found that the demand of the plaintiffs was prior to the demand of the petitioner.

To this report exceptions were taken by the petitioner Hugh Wallace, and those exceptions having been overruled by the Master, the case was argued on appeal from the Master's decision.

The point raised by the exceptions was, that the petitioner's mortgage of the 1st of July 1832 was registered on the 30th of November 1847, and that the deed of the 18th of July 1831, under which the plaintiffs claimed, was never registered, and that therefore

the Master should have found that the petitioner's demand was prior to that of the plaintiff's.

The facts of the case were these:—

By indenture of the 18th of July 1831, made between the said Hugh Kennedy of the one part, and his daughter Dorothea Kennedy of the other part, reciting, among other things, that a marriage was shortly intended to be had and solemnised, between Samuel Price, Esq., and the said Dorothea, and reciting that the said Hugh Kennedy had agreed, in order to make a present provision for the said Dorothea, to grant to her and her assigns, during the joint lives of them, the said Hugh Kennedy and Dorothea Kennedy, an annuity or yearly rentcharge of £100, to be issuing and payable out of and charged upon the lands therein mentioned; it was witnessed, among other things, that the said Hugh Kennedy granted to the said Dorothea the said yearly rentcharge, to be issuing and charged upon the lands of Cultra, and other lands in the deed mentioned; and the deed contained the usual powers of distress and re-entry. That deed was not registered.

By deed bearing date the following day (the 19th of July 1831), which was the marriage settlement, executed on the marriage of the said Samuel Price with the said Dorothea, and made between the said Samuel Price of the first part, Hugh Kennedy of the second part, Dorothea Kennedy of the third part, and trustees of the fourth part, after reciting, among other things, that the said Hugh Kennedy, by the said deed of the 18th of July 1831, had granted to the said Dorothea, during their joint lives, the said annuity or rentcharge of £100, charged on said lands of Cultra, &c., situate in the barony of Castlereagh, and county of Down, it was, amongst other things, witnessed, that the said Dorothea, with the consent of the said Samuel Price, her said then intended husband, and also of the said Hugh Kennedy, testified by their executing said indenture, did grant &c., to the said trustees the said annuity or yearly rentcharge, issuing and payable out of, &c. (the deed described the lands and their denominations, and the parish, barony and county wherein the same were situated), upon certain trusts therein mentioned.

That deed was duly executed by the parties thereto, and amongst

1850.  
Rolls.  
HUNTER  
v.  
KENNEDY.  
Statement.

1860.

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the rest by Hugh Kennedy, and was registered on the 1st of September 1831. The annuity afterwards became vested in the plaintiffs.

Hugh Kennedy, on the 1st of July 1832, mortgaged the said lands to the petitioner John Wallace, and the mortgage was registered on the 30th of November 1847. The petitioner insisted that he had priority over the plaintiffs, by virtue of the registry of the mortgage, on the ground that the deed of the 18th of July 1831 was never registered, and that the deed of marriage settlement of the 19th of July 1831 was only an assignment of that rentcharge by Dorothea to the trustees of the settlement, and that the registry of the assignment of the rentcharge could not be considered as a registry which could affect the petitioner.

Argument.

Mr. *F. Fitzgerald* and Mr. *Pilkington*, for the petitioner's objections, cited *Honeycombe v. Waldron* (a); *Doe d. Rennick v. Armstrong* (b); *Battersby v. Rockfort* (c).

Mr. *Martley* and Mr. *Wall*, for the plaintiffs, relied on *Stuart v. Ferguson* (d); *Warburton v. Ivie* (e); *Bushell v. Bushell* (f); *Eyre v. Dolphin* (g); *Drew v. Lord Norbury* (h); *Hill v. Mill* (i).

The MASTER OF THE ROLLS, after stating the facts of the case as above, said:—

July 22.Judgment.

It is to be observed that the assignment of the rentcharge was with the assent of Hugh Kennedy, who was a party to and executed the deed of assignment. The question which arises is, whether the deed of mortgage of the 1st of July 1832, which was registered in November 1847, had priority over the marriage settlement of the 19th of July 1831, which was registered on the 1st of September 1831?

(a) 2 Strange, 1064.

(b) 1 Hud. &amp; Br. 727.

(c) 8 Ir. Eq. Rep. 284.

(d) Hayes, 452.

(e) 1 Hud. &amp; Br. 758.

(f) 1 Sch. &amp; Lef. 90.

(g) 2 Ball &amp; B. 290.

(h) 9 Ir. Eq. Rep. 171.

(i) 12 Ir. Eq. Rep. 107.

Counsel for Mr. John Wallace has contended that the unregistered deed of the 18th of July 1831, by which Hugh Kennedy granted the rentcharge to his daughter, issuing out of the lands of Cultra and other lands, was, under the 5th section of the statute 6 Anne, c. 2, fraudulent and void as against the mortgage of the said lands of July 1832, which was duly registered. He, at the same time, however, insists that the said deed of the 18th of July 1831 was valid, so as to render the registered deed of the 19th of July 1831 entirely inoperative. Mr. Hugh Kennedy was a party to the deed of the 19th of July 1831. His daughter Dorothea granted the rentcharge with his assent, as recited in the said deed. It is said, however, that Mr. Hugh Kennedy had nothing to convey, having by the deed of the previous day granted the rentcharge to his daughter. I am of opinion that Mr. Wallace's Counsel is not at liberty to argue that the deed of the 11th of July is fraudulent and void, under the 5th section of the statute of Anne, and yet valid so as to prevent the deed of the following day, which was registered in September 1831, being effectual as against the mortgage of 1832.

On referring to the entries in the Registry Book of names in the office of the registry of deeds, the name of Mr. Hugh Kennedy is entered as a grantor in the deed of the 19th of July 1831. In the Index of Lands the said deed is also referred to, and I think the object of the Act would be defeated, if the Court, in each case, was to enter into a critical inquiry as to the strict legal operation of a deed duly executed by a party thereto, and duly registered. It has never been hitherto decided that an assenting party to a registered deed can afterwards, by a subsequently registered deed, defeat the previous registered conveyance executed by himself.

If Hugh Kennedy had been no party to the deed of the 19th of July 1831, the question would have been very different. It might then have been contended, on the authority of *Honeycombe v. Waldron*, and the cases in this country which followed that decision, that the registry of the deed of the 19th of July 1831 could not have been considered as a registry of the deed of the previous day, and that therefore the registered mortgage executed by Mr. Hugh Kennedy to Mr. J. Wallace had priority.

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1850.      The names of all persons, whether granting or assenting parties to a deed, are, by the course of the office for the registration of deeds, entered in the Index of Names as grantors; and the question is, whether, where a party to a deed duly registered joins in the conveyance as an assenting party, and subsequently executes a conveyance of the same lands to another grantee, which conveyance is also registered, can such second grantee insist that the prior registered deed is invalid, because the first deed only operates as a confirmation, and the second as a grant? The 5th section of the Act has no application, as that clause applies as between an unregistered deed and a registered deed; and I am of opinion that there is nothing in the 4th section to give priority to the deed of 1832 over the prior registered deed of the 19th of July 1831.

I concur in the opinion of the Master, and the motion to vary the report must be refused, with costs.

#### O'BEIRNE v. O'BEIRNE.

*Nov. 20, 23.*

Leave to amend the bill without prejudice to an injunction will not be granted as of course. The motion must be made without delay, and be supported by an affidavit stating the proposed amendments, and when the matter of them came to the plaintiff's knowledge.

THE bill in this cause was filed on the 6th of February 1850, for the purpose of obtaining from the defendant a conveyance of certain lands, and of restraining him by injunction from proceeding in an action of ejectment to recover possession thereof. On the 12th of February 1850 an injunction was granted until answer or further order. The defendant answered on the 5th of April, and on the 26th of April the injunction was continued until the hearing. On

Where the answer had been filed in April, an application made in August for leave to amend by introducing charges and an interrogatory founded thereon, in avoidance of a defence set up by the answer, was refused.

The practice in Ireland in this respect is correctly stated in *Donegal v. Berry* (1 Hog. 46), and differs from the practice in England as stated in *Ferrand v. Hawer* (4 M. & Cr. 113).

the 8th of August 1850, the plaintiff, by his solicitor, signed a consent that the plaintiff might be at liberty to amend the bill, as he might be advised, without prejudice to the injunction, and served it on the defendant's solicitor, who refused to sign it. The consent was accompanied by a letter, by which the plaintiff's solicitor proposed and undertook to speed the cause, and to have it heard in the ensuing Michaelmas Term, if the defendant's solicitor was so disposed. On the 31st of August, the plaintiff presented a petition to the Lord Chancellor, praying that he might be at liberty to amend the bill as he might be advised, without prejudice to the injunction. On the 8th of November he served a notice specifying the amendments which he sought to make in the bill, which were as follows :—

"And your suppliant shows that at the time of the execution of the said indenture of the 2nd of January 1836, the said George O'Beirne was upwards of thirty years of age and had been amply provided for by the said Patrick O'Beirne, his father, and was in easy circumstances."

"And your suppliant charges that the said George O'Beirne had been provided for by the said Patrick O'Beirne, previous to said purchase from the said Patrick French Kelly and Jane his wife; and your suppliant therefore charges that, in any event, said purchase cannot be deemed an advancement for said George O'Beirne."

"And whether the said George O'Beirne was not upwards of thirty years of age on the said 2nd day of January 1836, or how otherwise? And let the said defendant state what age he was on said last-mentioned day, and whether on said last-mentioned day the said defendant was not in easy circumstances, or how otherwise? and had he not been previously provided for by the said Patrick O'Beirne, his father, or how otherwise? And what was the income and means of support of said defendant, on said last-mentioned day? And had he not on said last-mentioned day a large or what amount of black cattle and sheep, or how otherwise? And was he not on said last mentioned day possessed of a considerable or some and what amount of money, or how otherwise?"

An affidavit made by the defendant's solicitor stated that since the  
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filling of the answer, he had been directed by his client to proceed with examination of witnesses, assigning as a reason that the defendant's mother, who was eighty years old, was his principal witness, and was in very feeble and delicate health. That he had frequently during the months of June and July requested the plaintiff's solicitor to file the replication, and that interrogatories for the examination of the defendant's mother had been prepared by Counsel, and were ready to be lodged.

Argument.

Mr. Robinson moved the prayer of the petition.

Mr. W. Bourke and Mr. Concannon, for the defendant, contended, that the motion to amend without prejudice to an injunction was not a motion which would be granted of course. That it should be founded on an affidavit stating the amendments, and when they came to the plaintiff's knowledge: *Donegal v. Berry* (*a*); otherwise the plaintiff might remodel his bill and make an entirely new case. The plaintiff had been guilty of great laches, and further delay might be prejudicial to the defendant, whose defence was that the deed in question was an advancement according to the authority of *Lord Grey v. Lady Grey* (*b*), which defence mainly depended on the evidence of a very old witness.

Mr. Charles Kelly, in reply, contended that the case of *Donegal v. Berry* did not apply, inasmuch as the amendments were in avoidance of a defence set up by the answer. That amendment of the bill without prejudice to an injunction was a matter of course, as stated by Lord Cottenham in *Ferrand v. Hamer* (*c*). He also cited *Pratt v. Archer* (*d*); *Barry & Keogh* (*Ch. Prac.* 109).

Nov. 23.Judgment.


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#### The MASTER OF THE ROLLS.

A petition was presented in Vacation in this case, praying that the plaintiff might be at liberty to amend the bill as he might be

(*a*) 1 Hog. 46.

(*b*) Finch, 370.

(*c*) 4 M. & Cr. 143.

(*d*) 1 Sim. & St. 133.

advised, without prejudice to the injunction obtained in this cause. The answer was filed early in April last, and an order to continue the injunction until the hearing was made on the 26th of April. The suit is to stay proceedings at law. The petition was presented on the 31st of August. It did not state the amendments which were sought to be made. The plaintiff endeavoured to supply that omission by a notice of the 8th of November, in which he stated what the proposed amendments were.

There are no cases in which the Court should be more particular in not allowing the plaintiff to delay the proceedings than in suits where an injunction was granted to stay proceedings at law. The plaintiff alleges that the necessity of amending the bill arose from matter put in issue by the answer. The answer was filed early in the month of April. It is not alleged that any of the matters proposed to be put forward by any amendment have come to the knowledge of the plaintiff since the answer was filed. The plaintiff has allowed the whole of Easter and Trinity Terms to pass without applying to amend the bill, having had full notice of every matter sought to be insisted on by amendment, early in April. The question is, whether it is a motion of course to amend an injunction bill without prejudice to the injunction? and if not, whether the Court should, after the delay which has taken place, make the order sought?

The plaintiff insists that the application is a motion of course, and relies on the case of *Ferrand v. Hamer* (a). In that case, the common injunction having issued against one of the two defendants for want of an answer, the plaintiff afterwards, by order of course obtained leave to amend, without prejudice to the injunction. Lord Cottenham appears to have considered that the order was not irregular, and that at all events it could not be impeached by the defendant, against whom an injunction had issued. Lord Cottenham's view in that case is not, perhaps, in conformity with Lord Eldon's, in the cases therein referred to; but as it was a matter of practice, he made inquiries, as to the practice, from the officers of the Court. In the course of his judgment Lord Cottenham says:—"It is also the undisputed practice that after a special injunction the

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(a) 4 M. & Cr. 143.

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*Judgment.*

plaintiff may amend his bill by motion of course, and not prejudice his injunction."

That observation was, however, extrajudicial. The practice has been otherwise in this country. It has not been the practice, either in the time of my predecessors, or since I have sat here, to make an order, as of course, to amend a bill, without prejudice to an injunction granted after notice to the defendant. This case is stronger, as the injunction was continued until the hearing after answer. And I believe no order was ever made in this Court, as of course, to amend a bill, without prejudice to an injunction, where the defendant has appeared. Notice is uniformly given. The case before Lord Cottenham was decided on the English practice. The practice here has been otherwise, and I shall not alter it. In the case of *Donegal v. Berry* (a), Sir William M'Mahon says:—"If the defendant has entered an appearance the motion must be on notice, and founded on an affidavit stating what the new matter is, and ascertaining that it came to the knowledge of the plaintiff after the bill was filed, or showing that the matter of the amendments, though no part of the plaintiff's original case, has now become material, in avoidance of the defence made by the answer; and the plaintiff will not be allowed to amend, unless he makes out these points to the satisfaction of the Court."

The motion not being of course, the question is, whether the Court should allow the amendments to be made?

I have already observed that the answer was filed early in April. The plaintiff does not allege that the facts sought to be introduced by amendment came to his knowledge since the answer. In the case of *Sharp v. Aston* (b), Lord Eldon laid down the rule thus:—"The principle of requiring the case for the injunction to be put upon the record immediately is, that the party, the prosecution of whose demand at law is to be delayed by the injunction, shall be delayed as short a time as is consistent with justice; but that principle is not controverted, where a plaintiff is not informed that an equity exists which would entitle him to relief. No blame can attach upon him for not putting it upon the record until he knows

(a) 1 Hog. 46.

(b) 3 Ves. & Beam. 146.

it; but as soon as he knows it he must put it on the record. In the case cited, I think the information was obtained not from the record, but *aliunde*. It is not material for this purpose how the plaintiff procures the information, even though unduly obtained; but if he gets it from the answer, the Court must know, from the bill and answer, that he cannot have as much benefit as if he had asked further questions. In that case, therefore, the Court required to know what were the proposed amendments—whether they were material, and if material, to have ascertained by clear and positive affidavit, that they related to facts of which the plaintiff had not a knowledge enabling him to bring that case upon the record sooner. All these facts must be substantiated."

The case of *Ferrand v. Hamer* is relied on as overruling the case before Lord Eldon. The case of *Ferrand v. Hamer* was the case of a common injunction\*, and the decision in no way affects the question now before the Court. Lord Cottenham, however, lays down (p. 145) extrajudicially:—"It is the undisputed practice that, after a special injunction, the plaintiff may amend the bill by motion of course, and not prejudice his injunction." So far from the practice having been undisputed, the practice is laid down, as stated by Lord Eldon, in *Eden on Injunctions*, p. 121, and *Daniel's Ch. Pr.*, pp. 399, 400; and Lord Eldon states the rule differently from Lord Cottenham in *Bliss v. Boscowen* (a). However, whatever the practice may have been in England, the application must, by the course of practice in this country, be on notice, and is not of course; and if so, the observations of Lord Eldon, in the case of *Sharp v. Aston*, and which appear to be supported by Sir W. M'Mahon's judgment in *Donegal v. Berry*, justify me in refusing to allow an amendment, without prejudice to the injunction, to stay proceedings at law, the whole of Easter and Trinity Terms having been allowed to elapse without any application to the Court. The delay in the proceedings of the Court of Chancery is justly complained of at present; and if this novel practice is now introduced for the first time in this country, it may lead to much injustice.

(a) 2 V. & B. 102.

\* The practice of the common injunction does not exist in the Court of Chancery in Ireland.

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## O'BEIRNE v. O'BEIRNE.

(Chancery.)

Where an injunction obtained on filing the bill has upon the coming in of the defendant's answer been continued until the hearing, and the plaintiff for the first time seeks to amend his bill without prejudice to the injunction, the Court will grant a motion to that effect if the proposed amendments be not inconsistent with the case previously made by the bill for the injunction. To sustain such a motion there is not any necessity for an affidavit stating when the matter of the proposed amendments came to the knowledge of the plaintiff.

*Donegal v. Berry* (<sup>1</sup> Hog. 46) and *Hamil-*  
*ton v. Patten* (1 Cr. & Dix, Ab. Cases, 203), observed upon.

THIS case, the facts of which are reported *supra* p. 152, now came on to be heard before the LORD CHANCELLOR by way of appeal from the order of his Honour the Master of the Rolls.

Mr. Christian and Mr. James Robinson, for the appellant, relied upon the 49th and 52nd General Orders as including injunction cases, and cited *Hamilton v. Patten* (a); *Mason v. Murray* (b); *Wyatt's Pract. Reg.*, p. 242; *Ferrand v. Hamer* (c); *Pratt v. Archer* (d); *Smith v. Pepper* (e). They also contended that the case did not fall within the observations of Sir William M'Mahon, M. R., in *Donegal v. Berry* (f).

Mr. Walter Bourke and Mr. Concannon, for the respondent, cited *Sharp v. Ashton* (g); *Lord Grey v. Lady Grey* (h); *Persse v. Persse* (i); *Donegal v. Berry* (k).

## The LORD CHANCELLOR.

I have not been able to obtain any further information respecting the practice of the Court in such matters as this. The authorities are not very distinct. The motion was made on part of the plaintiff for leave to amend his bill without prejudice to the injunction. That injunction was obtained upon motion, supported by affidavit, on filing

- (a) 1 Cr. & Dix, Ab. Cas. 203.
- (c) 4 Myl. & Cr. 145.
- (e) 1 Hog. 334.
- (g) 3 V. & B. 146.
- (i) 4 Law Rec. N. S. 12.

- (b) 2 Dick. 536.
- (d) 1 S. & St. 433.
- (f) 1 Hog. 46.
- (h) Finch, 370.
- (k) 1 Hog. 46.

to continue the injunction to the hearing, and on debate that motion was granted. It was therefore an injunction obtained according to the existing rule of the Court, expressly and distinctly upon the merits. The answer having so come in, and nothing else having been done, the motion now before me was made for liberty to amend the bill without prejudice to the injunction. In reference to the particular amendments proposed, it is unnecessary to make any further observation than that they do not appear to be immaterial; and they may undoubtedly be material for the purpose of negativing allegations in the defendant's answer, although not actually introductory of new matter. They are material as affording means of interrogating the defendant; and I think it is plain that the matter intended to be introduced has nothing to do with the merits of the injunction, because, as that was obtained on the answer which contains the negative of the averments intended to be introduced by the amendment, it must be taken *a fortiori* that the insertion of these amendments in the bill cannot affect the injunction. So far as they go, they profess to sustain the case made by the bill. Then comes the simple question, whether the party is at liberty (this being the first time of amendment) to amend the bill in this respect without an affidavit, that the subject-matter of the amendments has been discovered since the filing of the bill, or any further affidavit than that made on the present motion? There are in effect two questions: whether a party is entitled, under the General Order of the Court, to make this amendment in the office, in an injunction bill, without coming to the Court at all? or if that be not so, ought the Court to allow the plaintiff to make the amendment without the stringent affidavit which, according to the authority to which I shall presently refer, is said to be necessary? The frame of the 49th Order is general as to amendments. It was therefore contended strongly on the part of the plaintiff that the motion was unnecessary, and that he should not therefore be compelled to pay the costs of coming here. Undoubtedly that would seem to be the *prima facie* meaning of the Rule. However, the General Orders of 1843 contain a preliminary declaration that the abrogation of any existing rule shall not be deemed to alter or affect the established practice of the Court

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originating therefrom, except so far as the same may be inconsistent with any of those General Orders. Is there then any general practice, founded on the antecedent rules, inconsistent with making the amendments in the office? I think it is important, however, in the first instance, to consider what in such a case would be the practice in England? Nothing is there better settled than that upon an injunction, granted upon the merits, it is a motion of course for liberty to amend the bill without prejudice to the injunction.

In *Pratt v. Archer* (a), Sir John Leach, V. C., so states the practice, and that such was the opinion of Lord Eldon. He added, that where the injunction had issued on account of delay, notice must be given and the proposed amendments stated; i. e., that where, as was the case in *Pratt v. Archer*, a common injunction was granted,\* according to the practice of the Court, as part of the process which the plaintiff was entitled to put in force in consequence of the delay of the defendant to appear or answer, the motion to amend without prejudice could not be sustained, because, according to the Old Rules, which are the same in this respect both in England and Ireland, where a common injunction was in force the amendment of the bill put an end to all process. That case contains, however, a clear expression of opinion with regard to a motion to amend where the injunction is obtained upon the merits. The same rule is laid down in *Turner v. Bazeley* (b). The cases of *Sharp v. Ashton* (c), and *Mair v. Thelluson*, referred to in the note to it, were applications for re-amendment of bills already once amended. In the note to *Pratt v. Archer* the case of *Penfold v. Stoveld* (d) is quoted as opposed to those cases; but on looking to *Penfold v. Stoveld* I find that it was a different case, and does not really affect the question. An injunction had there been obtained *ex parte* on filing the bill, and an answer was put in so fully answering the case made by the bill as to render it probable that the injunction would be dissolved on a motion for the purpose, and a motion to amend the bill without prejudice to the injunction

(a) 1 S. &amp; St. 438.

(b) 2 V. &amp; B. 331.

(c) 3 V. &amp; B. 146.

(d) 3 Mad. 471.

\* Vide *Pickering v. Hanson*, 2 Sim. 488.

was refused under those circumstances, with costs. That case may be considered as rightly decided, because the application was in effect one for an amendment after injunction dissolved. However, whether it be correct in principle or not, it does not appear to me to interfere with the cases which I have referred to. In *Ferrand v. Hamer* (*a*), Lord Cottenham says :—"It is also the undisputed practice, that after a special injunction the plaintiff may amend his bill by motion of course, and not prejudice his injunction ;" and for this position he cites *Mason v. Murray* (*b*), and *Pratt v. Archer* (*c*). The only question which has arisen on this subject in England tends to show how much this sort of motion is considered as a mere motion of course. The statute 3 & 4 W. 4, c. 94, s. 13 (Eng.), gives jurisdiction to the Masters to hear and determine all applications for leave to amend bills ; and the 14th section enacts, that no such application shall in future be heard by the Court except on appeal. In *Rees v. Edwardes* (*d*), an application was made to Lord Langdale, M. R., for leave to amend the bill without prejudice to the injunction, which was originally the common injunction, but had been continued on the merits on the coming in of the answer, and the object of the motion was to amend such parts of the bill as were founded upon a mistake not affecting those merits. His Lordship granted the motion upon payment of costs, observing that "it had been held that the Act did not apply to orders of course to amend the bill, nor to cases in which the Court, being possessed of all the circumstances of the case, was enabled at the time to exercise a proper discretion on the subject of amendment ;" and followed up those remarks by saying :—"In the present case the plaintiff required something more than an order to amend. That something more the Master could not give ; and if the Court refused to hear such a motion as this, the plaintiff could only obtain that which he might be perfectly entitled to by first applying to the Court for an order to the effect that if, on a future application to the Master, he should obtain an order to amend his bill, such order to amend might be without prejudice to the injunction." This he denounces

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(*a*) 4 Myl. & Cr. 145.

(*b*) 2 Dick. 536.

(*c*) 1 S. & St. 483.

(*d*) 1 Keen, 465.

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*Chancery.*  
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as an inconsistent course. Those observations will apply to our general rule, which enables the plaintiff to amend; but if he want something more, *ex. gr.*, to amend without prejudice to his injunction, they tend to show that he must come to the Court.

In *Woodroffe v. Daniel* (*a*), the common injunction had been continued on the merits; the plaintiff afterwards moved for leave to amend without prejudice to it. The Vice-Chancellor took a different view from that of Lord Langdale in *Rees v. Edwardes*; refusing the motion, he said that the amendment of the bill could not prejudice an injunction granted or continued on the merits, and "therefore the words in the notice of motion, without prejudice to the injunction, were mere words of superfluity, and the motion was in fact a motion to amend *simpliciter*, and ought to have been made before the Master." That is the strongest instance which I have found of the view taken by the Courts in England, and puts the matter upon grounds which, if applicable to the rules here, decide this question. I am not called upon to say whether that case is right or not; it is a strong case, and shows that the Vice-Chancellor thought that the motion was one to amend *simpliciter*.

In *Ferrand v. Hamer* (*b*), which I have already referred to, the common injunction issued against one of two defendants for want of an answer, the other defendant answered, and the plaintiff afterwards, by an order made as of course at the Rolls, obtained leave to amend without prejudice to the injunction. Lord Cottenham thought that such an order was not irregular, and at any rate could not be impeached by the defendant, against whom no injunction had been issued. The same proposition appears to have been decided in *Brooks v. Purton* (*c*). Looking then to what has been done in England, I think it very clear that there a motion to amend without prejudice to an injunction upon the merits must be regarded as a mere motion of course, and that the only question arising there is, whether the Masters could make such an order under the authority vested in them, without the plaintiff being obliged to apply to the Court? Has there been any Irish practice antecedent to the Gene-

(*a*) 9 Sim. 410.

(*b*) 4 Myl. & Cr. 143.

(*c*) 1 Y. & C. C. 271.

ral Orders which ought to render the English and Irish practices different? If it be reasonable or right that it should in England be a motion of course, as the Judges there think it is, it must be equally reasonable and right that it should be so here; therefore so far as reason goes there cannot be any dispute. But is there any authority establishing a different practice here? The case mainly relied on in the affirmative was *Donegal v. Berry* (a); and it is said that Sir William M'Mahon there laid down certain rules which render it impossible to apply the English practice to this case. I admit that he laid down certain stringent rules, but I have inquired into the facts of that case, and I find that it did not come on upon a motion to amend the bill, but that it came on upon a motion to dissolve the common injunction obtained upon attachment for want of an answer of one of the defendants. However, Sir William M'Mahon thought proper to enunciate the rules, which we find in 1 *Hogan*.—[His Lordship here read the observations in that case.]

Now it is quite plain that he was speaking there of the common injunction for want of an answer, as was the actual state of fact in that case, which, as I have said, I caused to be examined into, and from which it appears that the motion to dissolve or set aside the injunction was made on the ground that the defendant was resident in England out of the jurisdiction; and the language of the Master of the Rolls in its terms excludes the case of an injunction obtained upon the merits, because he uses the words “unless the injunction has been raised upon the answer.” Again he refers to the ancient rules, and it is plain that they also apply to a bill sought to be amended without prejudice to the common injunction obtained for want of an answer, or for the purpose of raising a new injunction.—[His Lordship read the three rules.]

All this is irrelevant to the case of an injunction upon the merits; and he appears to me to exclude that case, as well as the case of a motion for leave to amend and that the defendant should answer the exceptions and amendments at the same time, from the operation of the stringent practice, as he states it throughout his judgment. What was the practice upon motions made where excep-

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(a) 1 Hog. 46.

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tions had been taken to the answer? The practice was that the party could move, if he did so in time, for liberty to amend the bill, and that the defendant should answer the amendments and exceptions at the same time. That could be now done by a side-bar rule; but even in injunction cases it was formerly granted by the Court as of course: *Creighton v. Talbot* (*a*); *Smith v. Pepper* (*b*). In *Hamilton v. Patten* (*c*), Sir M. O'Loghlen went somewhat further in the construction of the General Orders; and taking his view to be the correct one, it would conform to that of the Vice-Chancellor in *Woodroffe v. Daniel* (*d*). Sir M. O'Loghlen, speaking of the 56th General Rule (Nov. 1834), which is not more general in its terms than the 49th of Sir Edward Sugden's Rules, says:—"It appears to me that the terms of that rule apply as well to injunction as to other cases, and therefore that in injunction cases, as well as other cases, in which exceptions to the defendant's answer are allowed, the plaintiff may obtain a side-bar rule to amend his bill, and that the defendant shall answer the exceptions and amendments at the same time;" that is, that the rule entitling the plaintiff to enter a side-bar order entitled him to add the words, "without prejudice to the injunction." However, it having been intimated to him that there were doubts as to the practice, he made the order, and declared that such should for the future be the practice, and I presume it is so still. I find then nothing to show that the motion to amend was not a motion of course in Ireland, where the injunction had been obtained upon the merits; that the same rule prevails in England; and even that the Vice-Chancellor of England has gone so far in such cases as to pronounce the words "without prejudice to the injunction" a mere superfluity. The practice has been to move in all cases for leave to amend without prejudice to an injunction; but at the same time I have not found any reported case in Ireland where a motion appears to have been made, after an injunction obtained on the answer, simply to amend the bill without prejudice to the injunction. *Persse v. Persse* (*e*) does not, in my mind, touch

(*a*) 1 Hog. 334.(*b*) 1 Hog. 352.(*c*) 1 Cr. & Dix, 203.(*d*) 9 Sim. 410.(*e*) 4 Law Rec. N. S. 12.

this case. The plaintiff had filed there an amended bill in order to raise the injunction. The Master of the Rolls there said that the motion was clearly irregular.

The only case where I find it expressly laid down that a motion was necessary, according to the practice of the Court, is *Welsh v. Hannan* (a), where the defendant moved to dissolve the injunction which had been ordered to be continued to the hearing upon the terms of the plaintiff speeding his cause; subsequently to which order, the plaintiff had filed an amended bill without leave. Lord Redesdale, however, allowed the injunction to stand, saying:—"Unquestionably the plaintiff has been irregular, and the General Rule is against him. But the amendment is in a material point, and such as the Court would have allowed if leave had been asked; and the defendant has been tardy on his part, for he ought to have made his application immediately."

I looked into *Howard's Ch. Pr.* without much success on this point. In his *Exch. Pr.*, vol. 1, p. 276, he cites *Hartwell v. Wright*, where that Court declared that a rule for amending the bill did not touch the injunction. But he adds, that the safe way is for the plaintiff to move to amend without prejudice to the injunction. And again in vol. 2, p. 556, he says that in all injunction cases such a motion is necessary, and the Court will thereupon make an order for the purpose; and he adds that "where the plaintiff amends his bill to continue or obtain an injunction upon equity confessed, this is always looked upon as dilatory, and the Court will take no notice of the charges or allegations added by the amendment, unless the plaintiff files an affidavit verifying such additional allegations, that they are material, and came to his knowledge since the filing of the original bill;" and in support of this position he cites three cases. But this position does not apply to the case of an amendment not sought for the purpose of either continuing or obtaining an injunction; and the old rules referred to, viz., those of 1772 and 1792, apply only to cases of amendments for such purposes.

We have a uniform course of practice in England; we have Sir M. O'Loghlen's authority to the effect that the words of the General

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 —  
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(a) 2 Sch. & Lef. 516.

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Rule would warrant the plaintiff in obtaining this order, to amend without prejudice, in the office. We have Sir William M'Mahon's observations confined to the common injunction, and the case before Lord Redesdale merely shows it to be irregular to make the amendment in cases of special injunction without coming to the Court; while in the same case we find it asserted that leave might be had [for the asking, the amendment being in a material point.

Beyond this there is no certain guide to the practice, but on the whole I conclude that a motion to the Court was considered to be necessary, but that to require, in cases of an injunction obtained upon the merits, an affidavit such as Sir William M'Mahon declared to be essential in other cases, would be a departure from the practice of the Court. I therefore think that the motion ought to be granted; but I cannot accede to the view that it was unnecessary. The case before Lord Redesdale, the observations in *Howard*, and the general practice, show that previously to the General Order the plaintiff should come to the Court; and I think it is convenient that the Court in the first instance should see that the amendments sought do not touch the case made for the injunction. Whether Sir M. O'Loughlen was right in declaring that a side-bar rule could be entered in that form in a case like that of *Hamilton v. Patten*, it is not necessary for me to decide. I am not satisfied that it would be proper to depart in a case like this from the former practice in that respect, nor do I think that the general language of the order requires me to do so—by holding that a side-bar rule could be so entered. My decision is that the order of the Master of the Rolls should be reversed, and the motion be granted, but without costs to either party, except the defendant's costs of appearing at the Rolls, which are to be paid by the plaintiff. Differing from the Master of the Rolls on a point of practice with which he is so very familiar, I felt it necessary to go at length into the authorities.\*

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\* In addition to the cases cited in the argument and judgment in the above case as to the effect of amendment upon bills for an injunction, vide *The Attorney-General v. Marsh* (13 Jur. 317), *Kennedy v. Lewis* (14 Jur. 166) and *Schneider v. Lizardi* (9 Beav. 461).

## SADLIER v. WHALEY.

(In the Rolls.)

July 2, 22.

On the 18th of September 1847, Sir Charles H. Coote filed his bill in this Court against the defendant Robert Whaley, and the plaintiff John Sadlier and others, claiming two several sums of £2000, and £2000 late currency, portions of two sums of £10,000 late currency over which John Whaley deceased had a power of appointment, under the provisions of a deed of the 5th of March 1813. The said John Whaley was the father of Lady Coote, the wife of the said Sir Charles H. Coote, and, on the marriage of his daughter, he by deed of the 24th of November 1814 appointed the two sums of £2000 to Sir Charles H. Coote. The bill so filed by Sir Charles H. Coote prayed that he might be declared entitled to the said two sums of £2000, with interest, and that they might be declared well charged on a certain term of one thousand years, of and in certain lands in the bill mentioned, and contained in the deed of the 5th of March 1813; and that it might be referred to the Master to take an account of the sum due for principal and interest on foot of the said two sums of £2000, and that the defendants, or such of them as should be bound so to do, should be directed to pay to the said Sir Charles H. Coote such sums as should be found to be due to him for principal and interest, together with his costs, and that, in default of payment, the said lands in the trust term should be sold, and it also prayed that it might be referred to the Master to take an account of all charges and incumbrances affecting the said lands, whether prior or subsequent to the date of the said Charles H. Coote's charge, and of their respective priorities, and all other necessary accounts.

The plaintiff John Sadlier was made a notice party to the said

But, *Sembly*, the decree was not binding on B, as he should have been made an answering and not a notice party.

A person having a power to appoint £10,000 secured on a term of years, appointed separate portions of the sum to A and B by separate deeds. A filed a bill, to which B was made a notice party, and obtained a decree declaring his portion to be well charged, directing the usual accounts of incumbrances, and a sale for payment of them. B also filed a bill for his portion, praying the same relief, to which a plea of the pendency of the former suit was put in. Held, that the two suits were not for the same matter, and the plea was overruled.

*Quare.*— Whether the existence of the decree in A's suit (supposing it to be binding on B), would be a defence in bar of B's suit?

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bill, under the 15th General Order. The defendant John Whaley entered an appearance in the said suit, and John Sadlier was served with the notice under the said General Order, on the 22nd of September 1847. John Sadlier did not enter a common or a special appearance; and, on the 24th of February 1848, Sir Charles H. Coote caused a memorandum to be entered, under the 16th General Order.

The cause was heard on the 15th of December 1848, and a decree was made, whereby it was declared that the said sums of £2000 and £2000, with interest, were well charged on the term of one thousand years of and in the said lands, and it was referred to the Master to take an account of the sums due for principal and interest on the said two sums, and also to take an account of all charges and incumbrances affecting the lands, whether the same were chargeable on the said term of one thousand years or affected the fee and inheritance of the lands, and to report the respective priorities thereof, and that the Master should be at liberty to publish advertisements for all persons having charges and incumbrances affecting the lands, to come in and prove, and further directions were reserved.

The plaintiff, John Sadlier, filed his bill against the said defendant Robert Whaley, and the other parties thereto, on the 10th of May 1847, in respect of the charge hereinafter mentioned, praying similar relief as was prayed by Sir Charles H. Coote. The defendant answered the said bill on the 25th of January 1848. On the 31st of January 1849, an order was made on the motion of Robert Whaley that the original bill so filed by the plaintiff John Sadlier, on the 10th of May 1847, should be dismissed as against the said Robert Whaley, with costs, for want of prosecution, which costs were afterwards paid before the filing of the amended bill by the said John Sadlier.

On the 3rd of April 1849, the said John Sadlier filed a bill against Robert Whaley, which was affixed as an amended bill to the original bill so filed by him, by which amended bill, which was to the same effect as the original bill, Robert Whaley was again brought before the Court as a defendant thereto.

To this amended bill Robert Whaley put in a plea on the 5th of October 1849, setting forth the matters which are above stated, and averring that the lands in Sir C. H. Coote's suit were the same lands as in this suit, and that the relief prayed in Sir C. H. Coote's suit was to the same effect as that prayed in this suit. \*The plea further averred that John Sadlier was bound by the proceedings in Sir C. H. Coote's suit, the memorandum having been entered under the 16th General Order, and that the bill of Sir C. H. Coote, and the several proceedings in his said suit, remained depending, and as of record in the Court of Chancery, the said suit of Sir C. H. Coote being yet undismissed; and the plea concluded with an averment, that the said bill, so exhibited against the said Robert Whaley and others, on the 3rd of April 1849, and so affixed under the circumstances in the plea stated as an amended bill to the original bill of John Sadlier, filed the 10th of May 1847, was for the same matters as the said bill of complaint so exhibited by the said Sir Charles H. Coote, and on which the said decree had been made as aforesaid.

The plaintiff John Sadlier did not set down the plea to be argued, but an order was made on the 11th of March 1850, whereby it was referred to the Master to inquire and report, whether this suit and the other suit pending, as in the plea of the said Robert Whaley, filed the 5th of October 1849, mentioned, were for one and the same matter?\*

The present suit was instituted to have an account taken of the sum due to the plaintiff, on foot of an indenture of assignment, bear-

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\* This order was made on an application by Mr. W. Smith on behalf of the defendant Robert Whaley to dismiss the bill for want of prosecution under the 82nd General Rule. Mr. Lawless appeared for the plaintiff, and offered to comply with the rule by filing a replication, which it was contended for the defendant he could not do, as the practice on a plea of another suit pending was to ascertain the fact, not by joining issue in the cause, but by a reference to the Master: 2 *Das. Ch. Pr.* 1st ed., p. 144; and it was also urged that such a reference was within the 64th General Rule, and would not be made after fourteen days from the notice of the plea: *Howlet v. Lambert* (F. & K. 226); and that it was no answer to a motion under the 82nd Rule. His Honor, after taking time to consider, made the above order, deeming the case within the spirit, though not the letter, of the 82nd Rule, and expressed some doubt as to Sir M. O'Loghlen's *dictum* in *Howlet v. Lambert*, that such an order was within the 19th General Rule of 1834 (analogous to the 64th Rule of 1843), though he followed the decision in that case by making the order.

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ing date the 28th of August 1844, whereby a certain other charge of £4000 was assigned to the plaintiff by one Patrick Nolan to secure a sum of £1200, with interest. The said £4000 formed part of the two sums of £10,000, another portion of which had been appointed to Sir Charles H. Coote by the said John Whaley, and the £4000 assigned to John Sadlier had been appointed by the said John Whaley to one Henry Whaley by deed of the 30th of August 1827, in pursuance of the powers contained in the said deed of the 5th of March 1813.

A motion was now made, on the part of John Sadlier, that the report of the Master might be varied, by finding that this suit and the other suit of Sir C. H. Coote, in the plea mentioned, were not for one and the same matter.

Argument.

Mr. Christian, in support of the motion, cited *Pickford v. Hunter* (a); *Bainbrigge v. Baddeley* (b); *Gage v. Lord Stafford* (c).

Mr. W. Smith, for the defendant, relied on *Foster v. Vassal* (d); 2 *Dan. Ch. Pr.*, 1st ed., pp. 144, 145; *Lord Red.*, pp. 201, 202, 4th ed.

Mr. W. Crozier, in reply, cited *Lord Red.*, 5th ed. p. 287; *Huggins v. York Building Company* (e); *Hornibrooke v. Ware* (f).

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## The MASTER OF THE ROLLS.

Judgment.

In this case a motion has been made that the Master's report may be varied. The facts of the case are these.—[His Honor stated the facts as above.]

The question which arises is, whether the Master was right in finding that this suit and Sir Charles Coote's suit are for one and the same matter?

Counsel for the defendant Robert Whaley insists, that although the suit of Sir Charles Coote is by a different party, and in respect of an entirely different demand, yet as Mr. John Sadlier was a

(a) 5 Sim. 122.

(b) 2 Phil. 705.

(c) 1 Ves. 544.

(d) 3 Atk. 587.

(e) 2 Atk. 44.

(f) 12 Ir. Eq. Rep. 440.

notice party in Sir Charles Coote's suit, and bound by the decree and proceedings therein, and at liberty to prove his demand in the said cause, the present bill is to be considered a suit for one and the same matter.

As a general rule it is necessary in equity, as well as at law, that both suits should be between the same parties: *Reeve v. Dalby* (a). It has been held, however, under particular circumstances, that it is not necessary to the sufficiency of the plea of the pendency of another suit, that the former suit should be precisely between the same parties as the latter.

Thus if a man institutes a suit, and afterwards sells part of the property in question to another, who files an original bill, touching the part so purchased by him, a plea of the former suit depending touching the whole property will hold, such suit being considered a suit for the same matter. So where one part-owner of a ship filed a bill against the husband for an account, and afterwards the same part-owner and the rest of the owners filed a bill for the same purpose, the pendency of the first suit was held a good plea to the last; for though the first bill was insufficient for want of parties, yet, by the second bill, the defendant was doubly vexed for the same matter.

So also where a decree is made upon a bill brought by a creditor on behalf of himself and all other creditors of the same person, and another creditor comes in before the Master to take the benefit of the decree, and proves his debt, and then files a bill on behalf of himself and the other creditors, the defendants may plead the pendency of the other suit; for a man coming in under a decree is *quasi* a party: *Smith v. Creagh* (b). The charge filed in the Master's office, and the suit afterwards instituted, were for one and the same matter. The cases on the subject are collected in *Lord Redesdale on Pl.*, 5th ed., p. 290; *Beames on Pl.*, pp. 139, 140.

In the case of *Bainbrigge v. Baddeley* (c), Lord Cottenham, in adverting to a plea of another suit depending, stated "that the plea

(a) 2 Sim. & St. 464.

(b) Batty, 408.

(c) 2 Phil. 709.

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must aver that the former suit was for the same matter. So the reference to the Master in such cases is to inquire whether the suits were for the same matter. That the same matter was in issue in both suits for different purposes, will not support the averment."

If a party proves under a decree in a creditor's suit, in respect of a certain charge or incumbrance, and then files a bill in respect of the same charge, the case of *Neve v. Weston* (*a*) shows that the pendency of the former suit may be pleaded, because the plaintiff is suing for the same matter, in respect of which he filed the charge, and is a *quasi* party to the first suit. Thus, in all the cases referred to, in which the second suit was not by the same party as the first, the plaintiff in the second suit claimed as purchaser from the party who filed the bill in the first cause, the purchase having been made pending the first cause; or one of the several parties entitled filed the first bill, without making the persons jointly interested parties, and filed the second bill in conjunction with the said parties; or a party who had filed his charge in a creditor's suit, and thus become a *quasi* party, afterwards filed a bill for the same demand, in respect of which the charge was filed. This was in effect a second suit by the same party. These cases, therefore, are only excepted cases, and appear to be so considered by Lord Redesdale, and were decided as falling within the general principle, which requires that the second suit must be by the same party.

It is, however, perfectly clear that the second suit must be for the same matter as the first. Lord Redesdale, at p. 288 of his *Treatise*, states:—"The plea must aver that the second suit is for the same matter as the first, and therefore a plea which did not expressly aver this, though it stated matters tending to show it, was considered bad in point of form, and overruled upon argument." And he refers to the case of *Devie v. Brownlow* (*b*).

Upon these authorities, I cannot understand how the suit by Sir Charles Coote, to recover £4000, part of two sums of £10,000, can be considered as a suit for the same matter as the present suit, instituted by the plaintiff John Sadlier to recover an entirely different sum, appointed by a different deed, although it happens to be another

(*a*) 3 Atk. 55.(*b*) Dick. 611.

portion of the same two sums of £10,000. The plaintiff in each suit is different. There is no privity between them, and the prayer of each bill relates to an entirely different demand.

It has been admitted by the defendant's Counsel that the pendency of the former suit would have been no defence to the present suit, if there had not been a decree in the first suit, and if the plaintiff in the second suit (John Sadlier) had not been made an answering or a notice party in the first suit. I do not understand how the decree in the first cause could make that a suit pending for the same matter, which was not a suit for the same matter prior to the decree.

The case of *Neve v. Weston* (*a*) was decided on the ground that a party by proving under a decree became himself an actor, and, when he had filed his charge for a demand, a bill afterwards filed by him for the same demand was in effect a second suit by the same party, for one and the same matter.

In the present case Mr. John Sadlier has been quite passive in the first suit, and there is no case establishing that the right to file a charge under a decree is to be considered as a suit pending for the demand which might be so proved.

The mistake, as it appears to me, into which the defendant has fallen, is, that he has confounded two classes of defence, in their nature entirely different. It may be that, where there is a decree in a creditor's suit, under which a party may prove, such decree may be pleaded in bar to a suit by a creditor, who could prove under such decree. Such a defence was set up by plea in the case of *Pickford v. Hunter* (*b*). The plea in that case was overruled on the ground that the decree in the first suit was not so beneficial to the creditors as that which the plaintiffs in the second suit might obtain. Whether, if this had not been the case, the defence would have been overruled, it is not necessary that I should decide. The plea in that case was not framed as the plea of another suit depending for the same matter, and did not contain the averment which, according to the passage in *Lord Redesdale's Treatise*, p. 288, is essential to the validity of such a plea.

(*a*) 3 Atk. 55.

(*b*) 5 Sim. 122.

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There was an averment in that plea that the rights and interests in both suits were the same, and the Vice-Chancellor observed that the averment was not true; "for the right of A to be paid his debt is not the same as the right of B to be paid his debt." That observation is applicable to the question now before the Court, and shows that the suit of Sir C. Coote and the suit of Mr. Sadlier, are not for one and the same matter.

If the defendant in this cause had pleaded the decree, and the facts which he relied on to show that Mr. John Sadlier was bound thereby as a notice party, and had not framed his plea as a plea of another suit depending for the same matter, Mr. Sadlier would probably have been advised to set down this plea for argument; then the question as to whether the decree would have been a bar would have been raised. But the defendant, by framing his plea as a plea of another suit depending for the same matter, rendered it impossible for Mr. Sadlier to set down the plea, and he was obliged, upon the authority of the case of *Tarleton v. Barnes* (a), to adopt the course of obtaining the usual reference to the Master.

The question, therefore, which arises on the objection to the report is not whether the statements in the plea of the decree might have been a defence, but whether the averment introduced into a plea, that the suits are for one and the same matter, and on which issue has been joined by the reference to the Master, is true? I am of opinion that the suits are not for one and the same matter, and that the Master's report cannot be sustained.

If the question which the defendant's Counsel has sought indirectly to raise (that the decree in *Coote v. Whaley* is binding on Mr. Sadlier, and a bar to this suit) was properly before the Court, it would be at least questionable whether such defence would be available. It has been decided by Sir James Wigram that if a person is made a notice party in a case in which he ought not properly to be so made under the General Order, he is not bound to appear, and is no way affected by the proceedings, and is not to be considered a party to the suit.

I much doubt that Mr. Sadlier was properly a notice party in Sir

(a) 2 Keen, 632.

Charles Coote's suit. Cases (a) have been decided in England on the corresponding English Order, calculated to show that he should have been an answering party, and if so the decree in *Coote v. Whaley* does not affect him.

I shall not, however, decide a question not properly before me, and which the defendant may, if he thinks fit, set up by his answer. All I decide is, that in my opinion the Master was not right in finding that this suit instituted by Mr. Sadlier and the suit of Sir Charles Coote are for one and the same matter. I shall therefore set aside the report, and declare that the two suits are not for one and the same matter.

(a) 2 Hare, 530, 532, 306; *Adams v. Paynter*, 1 Col. 53.

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In the Matter of the Act of 11 & 12 Vic. c. 68, and the Trusts of the  
Settlement of WILLIAM ORME, Esq.

Nov. 30.  
1851.  
Jan. 14.

THE petition in this case was presented by the petitioner Francis A fund was assigned by a  
Knox Orme, under the provisions of the 11 & 12 Vic. c. 68 (the marriage settlement to trustees upon

trust after the death of A to transfer it and all the interest, &c., unto and amongst all and every the child or children of the marriage, or the issue of any such child or children who might happen to be then dead, leaving issue, or to any one or more of such children, or issue of such deceased children, &c., at such age or ages, time or times, and in such parts, shares or proportions, if more than one, and with such maintenance in the meantime, and under and subject to such conditions, restrictions, charges and limitations over (such limitations over being for the benefit of some one of such children) as A by his will, &c., should appoint, and in default of appointment to pay the fund between all the children if more than one of the marriage, and the issue of any children who should be then dead, leaving issue; and if but one to such one child; the said fund to be paid, &c., to sons at twenty-one and to daughters at twenty-one or marriage, in case such ages or days should not take place until after the decease of A; but in case such should happen in his lifetime, then such payment should be postponed until after his decease. A by will appointed the fund to the children of the marriage share and share alike, on their attaining twenty-one or marriage with consent, and directed that the interest should be for their support and maintenance, given in trust to his wife, until the boys entered professions or attained twenty-one, and the girls attained at twenty-one or married with consent.

*Held* 1. That the portions were by the settlement vested in the children before the period of payment.

2. That the provision in the will as to maintenance was of itself sufficient to vest the portions.

The rules as to the vesting of portions and legacies are the same.

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*In re*  
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*Statement.*

Act for the Better Securing Trust Funds and for the Relief of Trustees), claiming to have transferred to him the sum of £633. 12s. 9d., £3 per cent. consols, being one-fifth of the sum of £3168. 3s. 9d. consols, transferred under the said Act to the credit of the matter.

The petitioner contended that the said sum of £3168. 3s. 9d. was the share of Thomas Orme, deceased, in certain personal property, the subject of a marriage settlement of the 13th of March 1826. Thomas Orme died under age and unmarried in the month of November 1846, leaving his mother and a brother and sister of the whole blood, and the petitioner and William Knox Orme, of the half blood, him surviving, which five persons would each be entitled to one-fifth of the fund in Court, if that fund vested in the said Thomas Orme in his lifetime. And the question in the case was, whether the said sum vested in the said Thomas Orme in his lifetime, he having, as already stated, died under twenty-one and unmarried? and that question depended on the construction to be put on the settlement executed on the marriage of his father and mother, dated the 13th of March 1826, and the will of his father, William Orme, executed in pursuance of a power contained in that settlement.

The petition stated that by indenture bearing date the 14th day of March 1826, and made between William Orme, Esq., since deceased, of the first part, Anne Orme, widow of the said William Orme (described in the said indenture as Anne Jackson spinster), of the second part, and Thomas Orme and the Rev. Andrew Jackson, both deceased, of the third part, being the settlement executed in contemplation of the marriage of the said William Orme with Anne Jackson, it was witnessed that, for the considerations therein mentioned, the said Anne Jackson assigned and transferred unto the said Thomas Orme and Andrew Jackson, their executors, administrators and assigns, three legacies of £1000, £1500 and £700 therein particularly mentioned, making together £3200, with all interest then due or thereafter to grow due thereon, to hold the same to the said Thomas Orme and Andrew Jackson, their executors, administrators and assigns, upon trust, from and after the solemnization of the said intended marriage, to pay and apply the interest and annual proceeds of the said three several legacies, to the said William

Orme and his assigns for his life, and immediately after the decease of the said William Orme, then upon trust to "transfer, assign, pay, apply and dispose of the said sum of £3200, and every part thereof, and all the interest, or annual or other profits of the same, unto and amongst all and every the child or children of the said intended marriage, or the issue of any such child or children who might happen to be then dead, leaving issue, or to any one or more of such children or issue of such deceased children, in exclusion of any other or others of them, at such age, ages, time or times, and in such parts, shares or proportions, if more than one, and with such maintenance in the meantime, and under and subject to such conditions, restrictions, charges and limitations over (such limitations over being for the benefit of some or one of such children or issue) as he the said William Orme by his last will and testament in writing, or by any other writing duly executed by him in the presence of and attested by two or more credible witnesses, should direct or appoint; and in default of any such direction or appointment, or in case of any such being made and the same should not take effect, and should not be a disposition of the whole of the said trust funds and premises, then as to so much thereof, of or concerning which no such disposition or appointment shall be made or take effect, upon trust to transfer, assign, pay and dispose of the said trust funds and premises unto, between and amongst all and every the children, if more than one, of the said intended marriage, and the issue of any such children, as shall happen to be then dead, leaving issue, equally to be divided between and amongst them, share and share alike, as tenants in common, and their respective executors, administrators and assigns (provided that such issue of any deceased child or children as aforesaid shall be entitled only to the share or shares which his, her or their father or mother respectively would have been entitled to, if living, such share or shares to be equally divided amongst the issue respectively entitled to the same, if more than one, and if but one, then the whole to such one), and upon trust in case there shall be only one child of the said intended marriage, to transfer and assign the whole of the said trust funds and premises, in default of appointment as aforesaid, to

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such only child, his executors, administrators and assigns, the said trust moneys or shares thereof, as the case may be, to be paid, transferred and assigned to such children, if a son or sons, at his or their age or respective ages of twenty-one years, and if a daughter or daughters, at her or their age or respective ages of twenty-one years, or day or respective days of marriage, which shall first happen, in case such ages or days shall not take place until after the decease of the said William Orme; but in case the same shall happen in his lifetime, then such payment, transfer or assignment shall be postponed till after his decease: provided always, and it is hereby declared and agreed, that the share or shares of such of the said children, or such child as shall be a son or sons, of and in the said sum of £3200, and the interest and annual or other profits thereof, shall, subject to such power of appointment, be considered as a vested interest and vested interests in him or them respectively, upon his or their attaining the age of twenty-one years, and in such of them as shall be a daughter or daughters upon her or their attaining the age of twenty-one years, or day or respective days of marriage, which shall first happen, although the said William Orme be then living."

Power was then given to the trustees to call in the legacies, and to invest the same on government or real securities, and that such legacies, when so invested, should be held upon the said trusts; and by the said indenture, the said William Orme covenanted with the said Thomas Orme and Andrew Jackson, that he the said William Orme should and would, immediately upon the solemnization of the then intended marriage, cause to be effected a valid and effectual policy of insurance upon the life of him the said William Orme, for a sum of not less than £6461. 10s. 9d., and payable upon his decease to the trustee, or trustees for the time being, of the said indenture of settlement; and it was declared that the amount of the said policy, when paid, should be held by said trustees, on the same trusts which were declared of the said sum of £3200.

The petition then stated that there was issue of the said marriage, two sons and one daughter only, namely, Thomas Orme, George Orme, and Maria Sidney Orme; and the said William Orme,

in pursuance and performance of the covenant, in that behalf, in the said indenture of settlement contained, effected an insurance upon his life with the Royal Exchange Insurance Company, for the sum of £6000, and another insurance with the London Insurance Company for £1000.

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The petition further stated that the said William Orme duly made his will in writing, bearing date the 19th day of May 1830, and the will, after referring to said indenture, contained, amongst others, the following clauses:—"I have, according to my present circumstances, amply provided for my said children by my said wife Anne, by the insurance effected at the Royal Exchange Office, Dublin, as also by any fortune I may be entitled to, by my marriage with her, the produce of which insurance and said fortune, derived through her, I leave, devise and bequeath to my children by my said dear wife Anne, share and share alike, on their attaining severally the age of twenty-one years or day of marriage, whichever shall first happen, provided such child or children shall marry with the consent, had in writing to such marriage, of their mother and Oliver Jackson, Esq., whom I appoint guardians to their persons and properties. I further direct that the interest on the said sums, now so left to them, shall be for their support and maintenance, given in trust to my said wife, until the boys enter into professions or attain the age of twenty-one years, and the girl or girls, until she or they may arrive at the age of twenty-one years, or should marry with the consent of their guardians as already specified; but should any child or children marry without such previous consent, then my will is that every such child or children shall forfeit any provision he, she or they may be entitled to, under my marriage settlement, which share shall go and be equally divided amongst their other brothers and sisters, acting in conformity with this my last will."

The petition stated that the said William Orme died on or about the 20th of August 1836, leaving William Knox Orme and the petitioner Francis Knox Orme, his two sons by a former marriage, and the said Thomas Orme, George Orme and Maria Sidney Orme, his children by the marriage with Anne Jackson, and leaving also the said Anne Orme, otherwise Jackson, his widow, him

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surviving, and administration with the will annexed was granted to Oliver Jackson.

The petition then stated the appointment of the petitioner and Francis Knox Orme, and the Reverend Thomas Orme Featherstone, under orders of the Court of Chancery, to be new trustees of the said settlement, in the room of former trustees, and the transfer of the trust property under the said orders to such new trustees.

The petition then stated that the said Thomas Orme, one of the children of the said William and Anne Orme, died in November 1846, under the age of twenty-one and unmarried, having previously executed a paper writing purporting to be a will, whereby he professed to bequeath to his brother and sister, the said George Orme and Maria Sidney Orme, £1000 each, and £1000 between his mother and half-brothers, William Knox Orme and the petitioner; but the petitioner submitted that such will was inoperative, being made when the said Thomas Orme was under age.

The petition then stated that Maria Sidney Orme attained her age in September last (1850).

The petition then stated the transfer of the sum of £3168. 3s. 9d., £3 per cent consols, to the credit of this matter, under the provisions of the 11 & 12 Vic. c. 68, being the one-third share or proportion of the said trust funds, to which the said Thomas Orme deceased was entitled after deducting the sum of £25 for costs.

The petition then submitted that the said Thomas Orme took a vested interest in the said sum of money, and that the same was divisible amongst his next-of-kin, viz., the said George Orme, Maria Sidney Orme (the brother and sister of the said Thomas Orme), and Anne Orme his mother, and William Knox Orme, and the petitioner, the half-brothers of the said Thomas, in equal shares.

The petitioner then prayed that the sum of £633. 12s. 9d., £3 per cent. consols (being one-fifth of the £3168. 3s. 9d.), invested to the credit of this matter, might be transferred to the petitioner, with interest from the 1st of November 1846, the day of the death of Thomas Orme, and prayed for a transfer of a like sum to William Knox Orme.

The *Solicitor-General* and Mr. *Brewster*, for the petitioner, contended that the portions were vested by the very terms of the settlement in the children of the marriage, though not payable until they attained the age of twenty-one : *Vize v. Stoney* (*a*) ; *Hanson v. Graham* (*b*) ; *Salmon v. Green* (*c*) ; *Berkely v. Swinburne* (*d*) ; *Stephens v. Frost* (*e*) ; *Harrison v. Grimwood* (*f*) ; *Davies v. Fisher* (*g*) ; *Hammond v. Maule* (*h*).

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Mr. *Christian* and Mr. *F. Fitzgerald*, for George Orme and Maria Lindsay Orme, contended that the portions were contingent ; that there was no trust created by the settlement except in the direction to pay the portions to the children at twenty-one or marriage ; that the giving of maintenance to the sons did not make the portions vested in this case, because the entire interest was not given, and the maintenance was given to the widow in trust for the sons until they went into professions, and because the gift of interest was made in execution of a power, and was separate and independent of the gift of the principal. They cited *Vawdry v. Geddes* (*i*) ; *Pulsford v. Hunter* (*k*) ; *Batsford v. Kebbel* (*l*) ; *Watson v. Hayes* (*m*) ; *Bull v. Pritchard* (*n*) ; *Saunders v. Vautier* (*o*) ; *Stephens v. Frost* (*p*) ; *Hubert v. Parsons* (*q*).

The MASTER OF THE ROLLS now delivered judgment. His Honor stated the settlement and will of William Thomas Orme, and other facts as above, and proceeded :—

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The question is, whether Thomas Orme, who died under twenty-one and unmarried, took a vested interest in the stock transferred to the credit of this matter ?

The trust fund settled by the deed of settlement of the 13th of March 1826 consisted of three legacies amounting to £3200, the

- (*a*) 1 Dr. & War. 337 ; S. C. 4 Ir. Eq. Rep. 64.
- (*b*) 6 Ves. 239.
- (*c*) 11 Beav. 453.
- (*d*) 6 Sim. 613.
- (*e*) 2 Y. & Col. Exch. 306.
- (*f*) 12 Beav. 192.
- (*g*) 5 Beav. 201.
- (*h*) 1 Col. 281.
- (*i*) 1 Russ. & M. 203.
- (*k*) 3 Br. C. C. 416.
- (*l*) 3 Ves. 362.
- (*m*) 5 M. & Cr. 125.
- (*n*) 5 Hare, 567.
- (*o*) Cr. & Ph. 240.
- (*p*) 2 Y. & Col. Exch. 306.
- (*q*) 2 Ves. sen. 281.

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amount of which was afterwards received by the trustees, and of the policy of insurance, the amount of which, when received, was to be held on the same trusts as the £3200.

It has been in the first instance contended by Counsel on behalf of George Orme and Maria Sidney Orme, who have opposed this petition, that there was no gift or trust created by the settlement of 1826, save in the direction to the trustees, that the trust moneys should be paid, transferred and assigned to the children of the marriage, if a son, at twenty-one, and if a daughter, at twenty-one or marriage; and that therefore the portions were not vested, but were contingent on such event taking place; and it was secondly argued on behalf of the said George Orme and Maria Sidney Orme, that, if the portions were contingent, the provisions in regard to maintenance in the said settlement, and in the will of William Orme, executed in pursuance of the power given to him by the said settlement, could not have the effect of vesting the portions.

The cases which have been decided on the construction of wills have been referred to in the course of the argument; and the general principle laid down by Sir William Grant, in *Leake v. Robinson*, is, that where there is no gift except in the direction to pay, and the direction to pay is when the legatee attains twenty-one, the gift is, in effect, to pay such of the legatees as should attain that age, and therefore failed as to such who died under it.

There is no doubt on this subject; but the last authority states the rule so clearly, that it may be as well to refer to it. *In the matter of the trusts of the will of Thomas Bartholomew, and of the statute 10 & 11 Vic. c. 96 (a)*, (which is the English Act, corresponding to that under which the present application has been made) a testator, by his will, directed the investment of £2000, and the payment of the interest to his daughter for life, and from and after her death declared that the trustees should hold the fund upon trust to pay the same or assign the securities whereon the same might be placed or invested, unto, between and among all and every the child and children of his said daughter, as and when they should severally attain the respective ages of twenty-one years, in equal shares and proportions, share and share alike; and then followed the words, "to whom

(a) 1 M'N. & G. 354.

I give and bequeath the same accordingly." It was held that the latter words contained a direct gift independently of the direction to pay, the words "to whom" referring to all and every the child and children of the testator's daughter, and consequently that a child of the testator's daughter dying under twenty-one, took a vested interest. That case was decided by Lord Cottenham, expressly on the ground that the words "to whom I give and bequeath the same accordingly" was a gift. His Lordship said:—"If these words had preceded the direction to pay at twenty-one, no question would have arisen; and why is not the same construction to be adopted, because he has specified the objects of his gift, not by describing them in this part of the sentence, but by referring to a description already made in the same sentence?" Lord Cottenham, no doubt, in that case distinctly recognised the rule as laid down by Sir W. Grant in *Leake v. Robinson*, and said:—"The rule is, that if there is a direct gift to legatees, a direction for payment, when they shall attain a certain age, shall not prevent the vesting of the legacy, and therefore the personal representative of a legatee dying under such age will be entitled. What Sir W. Grant decided was, that where there was no gift, except in the direction to pay, and the direction was to pay when the legatee attained the acquired age, the gift was in effect to such of the legatees as should attain that age, and therefore failed as to such who died under it."

I doubt much the application of the rule as laid down by Sir W. Grant to the present case. The trust fund was assigned to the trustees in the settlement of 1826, upon trust, immediately after the decease of the said William Orme, to transfer, assign, pay, apply and dispose of the said sum of £3200, and all the interest or annual or other profits of the same, unto and amongst all and every the child or children of the said intended marriage, or the issue of any such child or children who might happen to be *then* dead leaving issue, or to any one or more of such children, or issue of such deceased children, &c., at such age or ages, time or times, and in such parts, shares or proportions, if more than one, and with such maintenance in the meantime, and under and subject to such conditions, restrictions, charges and limitations over (such limitations over being for

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the benefit of some or one of such children), as he the said William Orme by his last will, &c., should appoint.

I apprehend that if the clause had stopped here, there would be no doubt that the portions would have vested in the children of the marriage, or the issue of children then dead, on the death of William Orme, subject to the power given to him.

The clause then proceeds to provide that, in default of any such direction or appointment, &c., the trustees should transfer, assign, pay and dispose of the said trust funds unto, between and amongst all and every the children, if more than one, of said intended marriage, and the issue of any children who shall be then dead leaving issue, equally to be divided between and amongst them share and share alike as tenants in common, and their respective executors, administrators and assigns, and upon trust in case there shall be only one child of the said intended marriage, in trust to transfer, &c., to such one only child, his executors, &c.; and then follows this part of the clause:—“The said trust moneys or shares thereof, as the case may be, to be paid, transferred and assigned to such children, if a son or sons, at his, her or their age or respective ages of twenty-one years, or if a daughter or daughters, at twenty-one or marriage, which shall first happen, in case such ages or days shall not take place until after the decease of William Orme; but in case such shall happen in his lifetime then such payment, transfer, or assignment shall be postponed until after his decease.”

It will thus be observed that the trust fund was vested in the trustees upon trust, immediately after the decease of the said William Orme (the father), to transfer, assign, pay, apply and dispose of the trust fund, &c., not only amongst the children of the marriage, but amongst the issue of a child then dead (*i. e.* dead at the death of William Orme the father), in such shares, &c., and with such maintenance in the meantime, &c., as William Orme should by his will, &c., appoint.

The objects of the power were thus—the children of the marriage and the issue of children, who had died in William Orme's lifetime. The trust fund was to go, in default of appointment, not only amongst the children of the marriage, but amongst the issue of

a child who was then dead (*i. e.* dead at the death of William Orme the father). Then follows the part of the clause already referred to, that the trust funds should be paid, transferred and assigned to such children, if a son or sons, at twenty-one, if a daughter or daughters, at twenty-one or marriage.

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It may be a matter of doubt whether the part of the clause last referred to includes the issue of a child who was dead at the death of William Orme; and if it does not include such issue, it would be difficult to contend that the portions were vested in the issue of a child who had died in the lifetime of William Orme, and were not vested as to the children. But if that part of the clause as to the payment, &c., to the children, if a son at twenty-one, and if a daughter at twenty-one or marriage, did include the issue of a child who died in the lifetime of William Orme, still I do not understand how it is established that there was no gift or no trust created save in the direction to pay. The part of the clause creating the trust is perfectly distinct from that which directs the period of payment; and if I were to hold that there was no trust created and no gift except in the direction to pay, and that the portions did not vest at the death of William Orme, this consequence would follow, that if a son, who survived William Orme, died under twenty-one, leaving a child, that child would not be entitled to his father's portion. I have already observed upon the language of the settlement which creates the trust immediately after the decease of William Orme. That trust is to the issue of a child then dead, and would not include the issue of a child who survived William Orme.

If, however, I were to assume that there was no gift or trust created unless in the direction to pay at twenty-one or marriage, the question arises, whether the effect of the provision in the deed of 1826, in respect to maintenance, and the execution of the power by William Orme, had the effect of vesting the portions?

It is laid down in *Roper on Legacies*, 4th ed., p. 573, that "although there be no gift of a legacy previous to the period appointed for its payment, yet if the intermediate interest be given to the legatee, or be directed to be applied for his maintenance or education, such circumstance will *prima facie* have the effect to vest the legacy."

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I apprehend the rules of construction applied in cases of legacies are equally applied to portions payable out of a money fund: *Stephens v. Frost* (a). Several of the cases are referred to in *Roper*, to which may be added *Vize v. Stoney* (b), and *Davies v. Fisher* (c). In *Vize v. Stoney*, Sir Edward Sugden said:—"Suppose a legacy is given to a son if he attains twenty-one, or to a daughter at that age or marriage, it is contingent; it cannot be more or less contingent, the law recognises nothing between a contingent and a vested legacy. All that can be said is, that the Court may deal with some contingencies with greater facility than with others. Now, if you annex to this contingent gift interest in the meantime, it is established by abundant authority that interest so given dispenses with the contingency. Though it still sounds in contingency, it cannot so operate. The interest is considered as in lieu of, and an acknowledgment for, the capital; and when the testator gives interest in the meantime, this Court always seizes upon that circumstance, as a proof that he intended the legacy should at some time be payable."

It has, however, been contended, on behalf of George Orme and Maria Sidney Orme, that if the gift of the maintenance be not of the whole interest of the portion, or if it be not payable during the entire period which is to elapse before the principal is payable, or if the instrument giving maintenance is merely the execution of a power, and not a direct gift by a person exercising ownership over his own property, the rule to which I have referred, and cited from *Roper on Legacies*, does not apply.

In the present case the power given to William Orme by the settlement of 1826 would have authorised him to direct the application of the entire interest by way of maintenance; and he did in fact so direct, except that the maintenance was given to the wife of William Orme, in trust, until the sons should enter into professions or attain twenty-one; the entire interest of the daughters' portions was given to the wife, in trust for the daughters, until they should arrive at twenty-one or marry with consent. So far as the daugh-

(a) 2 Y. & Col. Exch. 302.

(b) 1 Dr. & War. 350.

(c) 5 Beav. 207.

ters are concerned the rule would apply; for the entire interest was payable, as maintenance, to the period when the principal was payable, and the appointment by will is to be considered as if the direction was contained in the settlement. It would be difficult to contend that the portions as to the daughters were vested by the provision as to maintenance, and not as to the sons, on the ground that the provision for maintenance, as to them, was until they should enter into professions or attain twenty-one.

The case of *Davies v. Fisher* (a) appears important on this point. Lord Langdale there lays down:—"But too much reliance must not be placed on the expression, 'the whole interest,' which has been used in some of the cases. In *Lane v. Goudge*, £30 a-year, part of the interest, was given to an annuitant for life. In *Jones v. M'Iwain*, an annuity of £100 was given out of the interest to the father of the children; and in *Bland v. Williams* there was a direction, and not a mere power or authority, to apply the interest, or a sufficient part thereof, for the maintenance of the children, and to transfer the capital, with so much of the interest as should not be applied in maintenance, to the children, when and as they should attain twenty-four years; and in those cases the gifts were held to be vested."

Upon that question there is, however, some doubt, as the rule is not laid down by Lord Cottenham in the same way in a case to which I shall presently refer. In that case of *Davies v. Fisher* there was a gift of personality to trustees for A for life, and after his death in trust for the children of A, "as they severally attained twenty-five years," the income to be applied during their respective minorities by the guardians, for their maintenance, &c., with a gift over in case no child of A should live to attain twenty-five. It was decided by Lord Langdale that the legacy was vested. Lord Langdale considered the question, as to the maintenance being only given during the minority, the payment of the principal being postponed beyond minority, and observed that "the inference or implication arises from the direction to apply the interest; and although the direction is limited to the minorities, it is not necessary, or I think reasonable, to limit the inference or the implication in

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like manner, as to the mere time to which the direction applies. There is a gift payable at a future time, and a direction showing that the donees are to have the benefit of the interest, on the death of the tenant for life. This direction expresses that, during the minorities, the interest is to be applied by the guardian, for support, maintenance, and education ; and there is no express direction, as to the application of the interest, after the minorities have ceased. At that time the mode of enjoyment expressly directed will cease ; but I do not think that it is therefore to be concluded that there is to be no enjoyment." Lord Langdale decided *Harrison v. Grimwood* much on the same principle.

In the present case, where the will directs that the interest of the sons' portions shall be given to the testator's wife, in trust for the support and maintenance of the sons, until they enter into professions or attain twenty-one, it was not intended that the wife should apply to her own use the interest payable on the sons' portions, from the time they entered into professions, until they attained twenty-one. The testator had no authority to give any such direction, nor is there any ground for supposing he so intended ; and it is not to be concluded, as Lord Langdale observes, that there was to be no enjoyment by the sons, in the interval from their entering into professions, until they respectively attained twenty-one.

It appears from a note to the case of *Davies v. Fisher*, that there was an appeal to the House of Lords ; but I have been unable to find any report of the case on the appeal, and presume that it was abandoned.

It has been contended, on behalf of the said George and Maria Sidney Orme, that the rule as to a gift of maintenance or interest having the effect of vesting the portion, is not applicable in the present case, because the testator was not bequeathing his own property, but only executing a power—first, in relation to the principal sum ; secondly, in relation to maintenance ; and it was contended that such a case falls within the principle decided in *Watson v. Hayes* (a), that where maintenance was given to a legatee as a distinct gift, and was not an application of the interest of the

(a) 5 M. & Cr. 125.

legacy, it would not effect the vesting of a legacy otherwise contingent. Lord Cottenham, in giving judgment in that case, said :— “ It is well known that a legacy which would upon the terms of the gift be contingent upon the legatee attaining a certain age, may become vested by a gift of the interest in the meantime, whether direct or in the form of maintenance, provided it be of the whole interest ; which clearly makes the principle, that it is the gift of the whole interest which effects the vesting of the legacy. Such was the opinion of Sir W. Grant in *Hanson v. Graham*, and *Leake v. Robinson*. It was recognised by Sir John Leach in *Vawdrey v. Geddes*. It is therefore the giving the interest which is held to effect the vesting of the legacy, and not the giving maintenance ; but when maintenance is given, questions arise whether it be a distinct gift, or merely a direction as to the application of the interest ; and if it be a distinct gift, it has no effect upon the question of the vesting of the legacy.”

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In that case it is to be observed, that although the £25 a-year maintenance would have been the interest on the legacy of £500 at £5 per cent., and was probably, as Lord Cottenham observed, fixed upon for that reason, yet the £25 a-year was directed to be paid out of the real and personal estate, and not out of the interest of the £500, and was a gift entirely distinct from the £500, and not a direction as to the application of the interest of the £500. In the present case there is a direction by the parent, under a power contained in the settlement, that the interest of the portions should be applied in payment of the maintenance, and if the effect of the authorities is, that supposing the deed of 1826 had contained a direction that the interest should be applied for the maintenance of the children, it would have had the effect of vesting the portions, I do not think the construction can be otherwise, where a power is given to the parent to direct the application of the interest in payment of maintenance, who executes the power accordingly.

There is a proviso at the end of the clause in question, that the sum of £3200 and the interest and annual proceeds should, subject to the power of appointment, be considered as vested interests in the sons on attaining twenty-one, and the daughters on attaining

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twenty-one or marriage, "although the said William Orme be then living." I do not, however, think, upon the whole, that the proviso can qualify or affect the legal construction of the previous part of the clause, and prevent the portions vesting on the death of the parent, although the children were under twenty-one.

This is a case upon which I have felt some doubt, and it is impossible to reconcile all the authorities. I am, however, of opinion, upon the whole, that the settlement of 1826 created a trust for the children of the marriage, and that the portion of Thomas Orme was vested, although he was not entitled to have the principal of the portion assigned to him until he attained twenty-one. I shall therefore make an order as prayed by the petitioner.



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**Ex parte SHEIL;**  
**In re Renewable Leasehold Conversion Act.**

A lease for lives, reserving a rent and certain duties, or a sum of money in lieu of duties, with a covenant for perpetual renewal upon payment of a renewal fine, contained a proviso, that if the lessee should not within three months after the fall of each life pay to the lessor or his heirs, &c., the renewal fine over and above the rent, fees and duties, and nominate a new life, the lessor might refuse to renew. A covenant by the lessee to pay fees and duties, sums of money in lieu of duties, and renewal fine; and that if it should happen that the rent, fees and duties, or other sums of money thereinbefore mentioned to be paid as aforesaid should be unpaid for twenty-one days after the days on which the same ought to be paid, the lessee, his heirs, &c., should lose and forfeit to the lessor, &c., one shilling in the pound in the name of a penalty, and so proportionably thereafter for a greater or lesser time whenever the same should be so behind afterward, and a power of distress as well for the rent, fees and duties, and other the sums of money to be paid for renewal, as for the sums of money so to be lost and forfeited, and a right of re-entry if the rent, fees and duties, or other the sums and penalties above mentioned, or any of them, or any part thereof. One life having dropped many years before without the renewal fine having been paid, Held, on a petition for a fee-farm grant, that the lessee was bound to pay the penalty of one shilling in the pound on the renewal fine before the grant should be executed.

(with sixpence in the pound receiver's fees), payable on the 1st of November and 1st of May: and the lease also reserved to the lessor the duties following—viz., eight fat hens at Shrovetide yearly, or sixpence in lieu of each hen.

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The lease then contained the following covenants:—

" And the said Clotworthy Lord Viscount Massareene doth for himself, his heirs, executors, administrators and assigns, and for every of them, covenant, promise, grant and agree, to and with the said Samuel Clarke, his heirs, executors, administrators and assigns, and to and with every of them, by these presents, in manner and form following, that is to say, that upon the death or failure of the aforesaid lives or life of the said Robert Clarke, Samuel Johnston and Jervis Johnston, or of any of them, which shall first happen, he the said Samuel Clarke, his heirs or assigns, first thereafter paying to the said Lord Viscount or those to whom the said rent and reversion shall as aforesaid appertain, the full sum of £6. 10s. sterling, in silver or gold, over and above the annual rent, fees and duties herein above reserved, and upon nomination of any other person by the said Samuel Clarke, his heirs or assigns, at his or their request to be put and inserted in the place and stead of the person so happening first to die as aforesaid, then the said Lord Viscount and those to whom the said rent and reversion shall as aforesaid appertain successively, shall and will within three months next after the death of such person so happening first to die as aforesaid, add and insert to the time and term of this demise the life of such person so nominated in the place and stead of the person so happening to die as aforesaid, which life so added and inserted is to be indorsed on these presents, or to be written on a deed, label or parchment, to be affixed to this present indenture for that purpose; and in like manner from time to time successively for ever upon the failure of every other several life in these presents nominated, or hereafter to be successively nominated as aforesaid; and upon the like payment of the like sum of £6. 10s. from time to time as aforesaid, over and above the annual rent, fees and duties hereinabove reserved; and upon the nomination of any other life successively, in lieu of every several life so failing as aforesaid, that then the said Lord Viscount, and those to whom the said rent and

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reversion shall as aforesaid appertain successively, shall and will, within three months after the failure of any other such several life, nominated as aforesaid, add and insert to the time and term of this demise, from time to time for ever, the several life or lives of such person or persons, to be nominated in the place or stead of the life or lives of the several person or persons so successively happening to die as aforesaid, which several lives, so to be added or inserted successively, are to be indorsed on these presents, or written on deeds, labels, or parchments, to be affixed hereunto as aforesaid; provided always that if it shall happen that upon, or within three months next after, the failure of any life hereinabove nominated, or hereafter to be nominated as aforesaid, the said Samuel Clarke, his heirs or assigns, shall or do not pay to the said Lord Viscount, or those to whom the said rent and reversion shall as aforesaid appertain, for every life so failing as aforesaid, the like sum of £6. 10s. sterling, over and above the annual rent, fees and duties herein-above reserved; and also shall not, within the said three months, nominate the life of some other person in lieu thereof, to be added to the time and term of this demise as aforesaid, then it shall and may be lawful to and for the said Lord Viscount and those to whom the said rent and reversion shall as aforesaid appertain, for ever thereafter to deny and refuse the said Samuel Clarke, his heirs and assigns, to add or insert, nominate or put, any other life or lives to the time or term of this demise, other than the life or lives which then shall be in being; and then and in such cases also the said demised premises, from and after the determination of the lives which then shall be in being, shall be and remain to the said Lord Viscount and to those to whom the said rent and reversion shall as aforesaid appertain; and the said Samuel Clarke, for himself, his heirs, executors, administrators and assigns, and for every of them, doth covenant, promise, grant and agree to and with the said Lord Viscount Massareene, his heirs, executors, administrators and assigns, and to and with every of them, by these presents, in manner and form following, that is to say, that he the said Samuel Clarke, his heirs and assigns, shall and will, from time to time, and at all times hereafter, during the demise and term hereby granted, well and truly perform, pay and satisfy to the said Lord Viscount,

and those to whom the said rent and reversion shall as aforesaid appertain, not only the above reserved rent, fees and duties, or sums of money in lieu of the said duties, at the election aforesaid, in manner as herein above reserved and expressed, but also that upon the failure of every life of every several person or persons herein above mentioned, and hereafter to be nominated as aforesaid, for whose lives and life this present demise is made, or hereafter shall be renewed as aforesaid, for every life that shall so fail, the full and entire sum of £6. 10s., over and above the said annual rent, fees and duties above reserved, within three months next after the failure of every such life; and that if it shall happen that the said yearly rent, fees and duties, or other sums of money hereinbefore mentioned to be paid as aforesaid, or any part of the same, or of any of them, shall be behind and unpaid by the space of one-and-twenty days next after any of the days or times on which the same ought to be paid as aforesaid, that then and so often, the said Samuel Clarke, his heirs or assigns, shall lose and forfeit to the said Lord Viscount, and those to whom the said rent and reversion shall as aforesaid appertain, one shilling sterling in the pound, for and in the name of a pain or penalty, and so proportionably thereafter, for a greater or lesser time, wherein the same shall be behind afterward; and that then and at all times, after the said one-and-twenty days, it shall and may be lawful to and for the said Lord Viscount and those to whom the said rent and reversion shall as aforesaid appertain, on the said demised premises, or any part thereof, to enter and distrain, as well for the said reserved rent, fees and duties, and other the sums of money to be paid for renewing of this demise, as for the said sum or sums of money to be lost and forfeited as aforesaid, and the distress or distresses then and there found and taken, to lead, drive, carry away, impound and dispose of according to law, until the said reserved rent, fees and duties, and all other the said sums of money, to be paid and forfeited as aforesaid, shall be fully satisfied and paid," &c.

The lease then contained a right of re-entry "if the said yearly rent, fees and duties, or other the sum and penalties above mentioned, or any of them, or any part thereof, shall be behind and

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Rolls.

*Ex parte*  
SHEIL.

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unpaid, by the space of three months next after any of the said days or times on which the same ought to be paid as aforesaid, though not demanded."

The interest of the said Samuel Clarke in the said lease subsequently became vested in John Sheil the elder, since deceased, the petitioner's grandfather; and by his will, dated the 10th of September 1813, the said lands, as held under the lease, were limited to the petitioner's father John Sheil for life, with remainder to the petitioner *quasi* in tail male. The petitioner since acquired the *quasi* fee in the said lands, and was entitled to the absolute interest under the lease. The lease was from time to time renewed, and the last renewal was executed on the 12th of October 1831, to John Sheil, the petitioner's father, by Thomas Henry Viscount Ferrard, in whom the reversion in the said lands was vested. The petitioner's father (who was one of the *cestui que vies* in the last renewal) died on the 2nd of January 1836, and one John Henderson and the petitioner were the surviving lives. The respondent Viscount Massareene was entitled to the reversion in the said lands.

The petition stated that the petitioner had, by his law agent, required from Lord Massareene a grant under the provisions of the said Act. It then stated a tender, on the petitioner's behalf, of the renewal fine of £6. 10s. late currency, with interest at £6 per cent. from the death of the petitioner's father, the only life in the last renewal which had fallen; and that Lord Massareene had refused to accept the same, insisting that he was entitled to charge the petitioner, in addition to the said fine of £6. 10s., payable on the death of the petitioner's father, with a further fine of five shillings for every twenty-one days that had elapsed since the death of the petitioner's father.

The respondent filed an affidavit, in which he denied the petitioner's right to a renewal, insisting that it had been forfeited by non-payment of the renewal fine on the death of the petitioner's father; but that defence was abandoned, and the only question ultimately discussed at the hearing of the petition was, whether the petitioner was liable to pay the penalty of one shilling in the pound on the renewal fine, for every twenty-one days which had elapsed since the renewal fine became payable?

**Mr. Napier** and **Mr. Vance**, for the petitioners.

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Rolls.

**Mr. Brewster** and **Mr. Wall**, for the respondent.

*Ex parte*  
SHEIL.

Argument.

For the petitioner it was contended that the words "other sums of money," in the penal clause, referred to the sums to be paid in lieu of the duties, and not to the renewal fine, and that it would have been inconsistent to have made the right of renewal cease, and at the same time to have annexed a fine *nomine pena* for non-payment of the renewal fine. On the other hand, the covenant by the lessee for payment of the renewal fine, and the clauses of distress and re-entry, were relied on as showing that the penal clause was intended to include the renewal fine. *Rex v. Inhabitants of Whitney* (a); *Doe v. Goodwin* (b); *Sandymon v. Breach* (c); *Colbrooke v. Tickel* (d); *Kitchen v. Shaw* (e); *Maund's case* (f); 1 *Wms. Saund.* p. 287, b, note 16; *Bac. Abr. Rent*, K, pl. 5; 18 *Vin. Ab.* p. 534; *Lord Doneraile v. Chartres* (g), were referred to.

The MASTER OF THE ROLLS.

1851.  
Jan. 14.  
Judgment.

The petition in this case has been presented by the petitioner under the Renewable Leasehold Conversion Act, to obtain a grant in fee from the respondent Lord Massareene of certain lands demised by an ancestor of his lordship to one Samuel Clarke, by lease dated the 24th of January 1701, for three lives, with covenant for perpetual renewal.

The respondent, by his affidavit, would appear to raise a question as to the right of the petitioner to a renewal. However, his lordship's Counsel have in the course of the argument admitted that the petitioner is entitled to a grant in fee under the statute; and the only question is as to the terms of the grant.

The usual course, where the right to a grant is not disputed, is

(a) 7 B. & Cr. 601.

(b) 4 M. & J. 265.

(c) 7 B. & Cr. 100.

(d) 4 Ad. & El. 916.

(e) 1 Nev. & P. 795.

(f) 7 Rep. 28, b.

(g) 1 Ridg. Pr. Cr. 122.

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*Rolls.**Ex parte  
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to refer it to the Master to settle the conveyance. As the parties, however, have argued before me the only question in dispute, it may save expense and prevent delay that I should declare my opinion on that question, and refer it to the Master to settle the conveyance, subject to such declaration. The facts of the case are as follow.—[His Honor stated the lease and the other facts as above.]

I do not understand the calculation of five shillings in the pound on the renewal fine of £6. 10s.; the penalty, if payable, being a shilling in the pound.

The question, however, is whether the penalty, whatever the amount may be, is payable on a renewal fine? and that depends on the question, whether in the clause imposing the penalty, in case of the non-payment for twenty-one days of the yearly rent, fees, duties, "or other sums of money hereinbefore mentioned to be paid as aforesaid," the latter words include a renewal fine?

The previous clause mentioned "the rent, fees, duties, or sums of money in lieu of the duties," and the renewal fine of £6. 10s. payable on the fall of each life, and there is a covenant in the said clause to pay the said several rents, duties, sums of money in lieu of duties and renewal fines, and therefore the words, "or other sums of money hereinbefore mentioned to be paid as aforesaid," are quite large enough to include a renewal fine.

Any difficulty, however, on the subject appears to be removed by the language of the next clause, which empowers the lessor and his heirs to distrain "as well for the said reserved rent, fees and duties, and other the sums of money to be paid for the renewing of the said demise, as for the said sum of money so to be lost and forfeited;" and the clause of re-entry is in case of non-payment "of the yearly rent, fees and duties, or other the sums and penalties above-mentioned, or any of them, or any part thereof."

The words in the clause of distress, empowering the landlord to distrain for "other the sums of money to be paid for the renewing of the said demise, as for the said sums of money so to be lost and forfeited," appear to me to show that the words in the clause in question, viz., "other the sums of money hereinbefore mentioned to be paid as aforesaid," did include the renewal fine, and that conse-

quently the respondent is right in the construction to be put on the lease.

It has been argued in this case that it would be strange that the clause in question should be construed as imposing a penalty for every period of twenty-one days which should elapse after the period of three months allowed for the payment of a renewal fine, when, by a previous part of the lease, if a life was not nominated within the three months, the premises, from and after the determination of the lives which should then be in being, should be and remain for the lessor and his heirs.

It has, however, been determined in several cases that a negative clause, such as that contained in the lease in this case, will not prevent a Court of Equity from decreeing a renewal: *O'Neill v. Jones* (*a*) ; *Lord Palmerston v. The Corporation of Dublin* (*b*) ; and Lord Eldon, although disapproving of the authorities, appears to have acquiesced in the decisions;\* and therefore there does not appear to be the inconsistency relied on by Counsel, having regard to the decisions on the subject of negative covenants.

If then the clause in question does impose the penalty for every period of twenty-one days during which the renewal fine remains unpaid, the case of *Doneraile v. Chartres* (*c*) decides that, where in a lease of lives renewable for ever there is a *nomine pœnae* in case of neglect to renew, a Court of Equity will not decree a renewal, except on the terms of paying the *nomine pœnae*.

I shall therefore declare in this case that the respondent is entitled to be paid by the petitioner one shilling in the pound in the name of a pain or penalty on the renewal fine, payable on the death of the petitioner's father, for every period of twenty-one days which has elapsed since his death, and so in proportion for any lesser period; and, with that declaration, I shall refer it to the Master to settle the conveyance, if the parties should differ about the same; and I shall direct the petitioner to pay the costs of the petition, and the proceedings thereon, to the respondent, and refer it to the Taxing-master to tax the same.

(*a*) 1 Ridg. P. C. 170.

(*b*) App. to Lyne on Leases, case 20.

(*c*) 1 Ridg. P. C. 122.

\* See 2 Dow. 467, 468.

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Rolls:  
*Ex parte*  
SHEIL.

—  
Judgment.

1850.

Chancery.

## BERNARD v. BOND.

June 12.

Where an order for a sale of lands has been made by the Commissioners for the Sale of Incumbered Estates, and a certificate thereof has been transmitted to the Court of Chancery, the latter Court is bound by the 42nd section of the statute 12 & 13 Vic. c. 77, to stay all suits or proceedings in which a decree for sale of the same lands has been pronounced; but where no such decree has been made that section leaves it at the discretion of the Court whether or not to stay any other suits and proceedings, even although their object should be to procure a decree for a sale of the same lands.

Subsequently to the institution of a foreclosure suit, and to the filing of the answer of certain defendants in that suit, who were incumbrancers prior to the plaintiff, a petition was presented by a near relative of those defendants in the Incumbered Estates Court, and an order was made thereon for a sale of the mortgaged premises. Afterwards a motion was made under the 82nd General Order of 1843, on behalf of those defendants, to dismiss the bill for want of prosecution; this Court refused that motion with costs; but *proprio motu*, stayed the suit.

(Chancery.)

THIS was an ordinary suit for the foreclosure of a mortgage and sale of the mortgaged premises, raising certain questions of priority between the plaintiff and other incumbrancers, who were defendants. Amongst the defendants were Mr. Thomas Bond and Charlotte his wife, whose incumbrance was anterior to that of the plaintiff, and who had, in the month of December 1849, filed their joint answer in the suit. By the owner of the equity of redemption of the mortgaged estates, who was the brother-in-law of Mr. Bond, a petition had, subsequently to the institution of the suit, been presented in the Incumbered Estates Court for the sale of the premises, upon which petition an order for sale was made on the 18th of January 1850, and by the Commissioners of the Court a certificate of the fact was sent on the 22nd of January to this Court. On the 15th of May following a motion on the part of Mr. Bond and his wife to dismiss the bill for want of prosecution was made before his Honour the Master of the Rolls, who refused the motion, with costs, but ordered at the same time that all further proceedings in the cause should be stayed until further order. The motion now came on by way of appeal from that order.

Mr. Pitt Kennedy, for the appellants.

Under the terms of the 82nd General Order this bill should be dismissed for want of prosecution: *Donovan v. Bissett* (a); *Loftie v.*

*Forbes (a); Croker v. Copy (b); Milward v. Fagan (c).* That part of the Rolls' order which stays the suit cannot be sustained: The proceedings in the Incumbered Estates Court cannot affect this suit, in which there has not been any decree for a sale.

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Chancery.  
\_\_\_\_\_  
BERNARD  
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Argument.

**Mr. Rollestone** and **Mr. T. R. Henn**, for the plaintiff.

Under the 42nd section of the statute 12 & 13 Vic. c. 77, the certificate of the Commissioners absolutely stayed the suit, so that the Rolls' order had no other effect than to affirm the statutory effect of the certificate. All proceedings having for their ultimate object a sale are imperatively stayed by the certificate under that section. In Ireland all mortgage causes are proceedings for a sale: *M'Donough v. Shewbridge (d)*; and the observations of Lord Eldon in *Perry v. Barker (e)*. The Master of the Rolls designated this motion as one completely for costs, and made in collusion with the petitioner in the Incumbered Estates Court, and his Honour accordingly refused to prejudge the question of our right to the costs of this suit by dismissing the bill for want of prosecution. No possible benefit could result to the appellants by its dismissal, inasmuch as their claim is prior to that of the plaintiff, who can only recover his costs in the same priority as his demand.

**Mr. F. Fitzgerald**, in reply.

The 42nd section treats of two classes of cases:—First, cases in which there has been a decree for a sale. Secondly, those in which there has not been such a decree, which it is plain are not to be peremptorily affected by the certificate. The 41st section shows that the Commissioners are to avail themselves of the proceedings in the latter cases, and the 42nd section gives the Court liberty to stay such proceedings, if proper reasons be rendered for doing so. It cannot be contended that any such reasons have been assigned here; the mere accident of relationship between the defendant and the petitioner cannot be deemed a good cause. All collusion between them is denied. This Court will not suffer an interference

(a) 2 Ir. Eq. Rep. 443.

(b) 2 Mol. 469.

(c) 12 Ir. Eq. Rep. 313.

(d) 2 Ball & B. 563.

(e) 13 Ves. 198.

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## The LORD CHANCELLOR.

with its practice beyond the strict limits laid down by the Legislature.

A question arising upon the 42nd section of the 12 & 13 Vic. c. 77, presents itself upon this motion to dismiss the bill for want of prosecution, which comes before me by way of appeal from the order of the Master of the Rolls, who refused the motion, with costs, and added to his order that the proceedings should be stayed. There has not been any decree in the cause for sale of the lands, and I think therefore that it is plain the certificate of the Commissioners of the Incumbered Estates Court does not *per se* stay the proceedings. I apprehend that great confusion would ensue if it were to have that effect. Where there has been a decree for a sale, the proceedings in this Court to a sale under that decree will be stayed under the express direction of the Court; but if there has not been such a decree, the 42nd section seems to me to leave it as a matter of discretion to this Court whether or not the proceedings shall be stayed. The question then is, whether that discretion has here been rightly exercised in staying this suit? The plaintiff filed his bill for a foreclosure and sale; the appellants here, Bond and his wife, filed an answer in December 1849, and beyond this there were not any proceedings in the cause. Their brother-in-law, the inheritor, has obtained an order for a sale upon a petition presented to the Incumbered Estates Court for that purpose, and those defendants now insist on their right to have the bill dismissed for want of prosecution under the 82nd General Order of this Court, and complain also of that part of the order which stays the suit. This is purely a motion for costs, and I think a wise discretion has been exercised by the Master of the Rolls in making the order. The certificate of the Commissioners, as I have stated, not of itself operating as a stay of the proceedings, the plaintiff should proceed in this cause to a decree for a sale which he could not execute, or incur the costs of all the defendants, who might insist on dismissing the bill for want of prosecution under the 82nd General Order, and

thus the mortgagor would have it in his power, by presenting a petition to the Incumbered Estates Court, and obtaining an absolute order for sale, to ruin his mortgagee, the plaintiff, by throwing upon him costs which he would not have any means of recovering. That would be a course of proceeding which I should be slow to encourage. If any person had reason to complain of that part of the order which stays the suit, the plaintiff was that person; but he does no such thing; to his objection I should have been bound to listen.

Acting upon the discretion given, in my opinion, by the 42nd section, and not considering my hands tied by the 82nd General Order, I shall affirm the decision of his Honour, with costs of this appeal.

NOTE.—*Vide* the next case.

1850.  
*Chancery.*  
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*Judgment.*

### MONEYPENNY v. GIBBINGS.

Dec. 14.

GEORGE MASSY of Glenwilliam, having made his will, died in 1835, seized and possessed of considerable real and personal property. Letters of administration, *cum testamento annexo*, were granted to William Hatro De Massy, his eldest son and heir-at-law, who subsequently died on the 23rd of May 1848, leaving his wife Mary De Massy (whom by his will he appointed his executrix), and two sons (infants), him surviving. The widow proved his will.

A creditor's suit for the administration of the real and personal estate of a deceased testator was in the list for hearing at the time of the institution of a suit by a legatee, who could have obtained

substantial relief in the creditor's suit, in which, shortly after, a decree to account was pronounced. Subsequently, on the petition of a creditor, the greater part of the real estate of the testator was ordered by the Incumbered Estates Court to be sold. This Court, being of opinion that the legatee's suit was oppressively and wantonly instituted, refused with costs a motion under the statute 12 & 13 Vic. c. 77, s. 42, on behalf of the legatee to stay his own suit, and ordered that, if he did not file a replication within a short specified period, his bill should stand dismissed, as against one of the principal defendants, with costs, including the costs of a contemporaneous motion made on her behalf, for its dismissal for want of prosecution.

The construction of the 42nd section of the statute 12 & 13 Vic. c. 77, adhered to, as laid down in *Bernard v. Bond* (*supra*, p. 198), in reference to staying proceedings in this Court, when lands, the subject of litigation here, have been ordered by the Incumbered Estates Court to be sold.

1850.  
Chancery.  
MONEY-  
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GIBBINGS.

Statement.

On the 23rd of June 1848, the cause of *Bevan v. De Massy* was instituted by judgment creditors of George Massy, for the purpose of administering his real and personal estate, and establishing his will and recovering their demands. That cause was set down on the 1st of September 1849, in the Lord Chancellor's list for hearing, at the ensuing Michaelmas Sittings. On the 11th of December 1849, the usual decree was pronounced in that cause for an account of the real and personal estate of George Massy, and also an account of such of his personal assets as reached the hands of William Hamo De Massy. On the 4th of October 1849, the bill in the suit of *Moneypenny v. Gibbings* was filed, in order to raise a legacy under the will of George Massy, in which legacy the plaintiff in the suit claimed an interest. That bill also prayed an account of the real and personal estate of George Massy, and of so much of the latter as reached the hands of William Hamo De Massy, and an account of the personal estate of William Hamo De Massy. In respect of the same claim, those plaintiffs had been made defendants in the prior suit of *Bevan v. De Massy*, by notice under the 15th General Order of 1843. Mary De Massy, the widow and executrix of William Hamo De Massy, and his eldest son and heir-at-law (a minor), were defendants in both suits.

On the 22nd of November 1849, a petition was filed in the Incumbered Estates Court by the defendant C. Delmege, a mortgagee of a considerable part of the lands, and on the same day he obtained a conditional order for a sale thereof, which was made absolute on the 14th of December 1849. Upon the 8th of February 1850, a motion was made on the part of Mary De Massy, founded upon a notice of the 16th of January, that the suit of *Moneypenny v. Gibbings* should be stayed. On that occasion the plaintiffs offered to consent that the suit should be so stayed, on the terms that they should be at liberty to prove under the decree in *Bevan v. De Massy*, not only for their demand, but also for their costs in *Moneypenny v. Gibbings*, and of eventually continuing that cause if necessary, they then insisting that the Court had not jurisdiction to stay the proceedings in that cause without directing that they should be at liberty to prove those costs under the decree in the other cause, and also because relief was

prayed in *Moneypenny v. Gibbings*, which could not be obtained in the other cause. The Master of the Rolls, considering that *Moneypenny v. Gibbings* was instituted for the purpose of accumulating costs, the bill having been filed after the other cause had been set down for hearing, made no rule on the motion, being of opinion that he had not jurisdiction, on motion, to stay proceedings without allowing the plaintiffs in *Moneypenny v. Gibbings* to prove for their costs in it under the decree in the other cause, and he pronounced this order without prejudice to Mary De Massy's right to insist at the hearing of *Moneypenny v. Gibbings* that the plaintiffs were not entitled to any costs. Having regard to this order, a notice was upon the same day (February 8th), on behalf of Mary De Massy, served upon the plaintiffs, requiring them to dismiss their bill, and offering to consent on her part, that such dismissal should be without costs, and stating that if they did not accede to this notice, she would proceed to file an answer in that suit. By notice of the 16th of February the plaintiffs offered to stay their proceedings on the same terms offered in Court upon the 8th of February.

On the 25th of March 1850, the plaintiffs in *Moneypenny v. Gibbings*, by notice, required the defendant C. Delmege to move to have that suit stayed under the 42nd section of the statute 12 & 13 Vic. c. 77, so far as related to a sale of the lands; with that notice he did not comply.

On a notice of the 2nd of May, certain other defendants moved to have the bill in that suit dismissed for want of prosecution; but his Honour the Master of the Rolls declined to make any rule on the motion. The same result attended a similar motion, made upon the 25th of July, on the part of the defendant Christopher Delmege.

The plaintiffs having pressed for an answer in that suit, Mary De Massy filed her answer on the 25th of April 1850. No replication was filed.

On the 23rd of November 1850, a motion having been made on the part of Mary De Massy, that the bill in *Moneypenny v. Gibbings* should be dismissed, with costs, for want of prosecution, and for the costs of the motion, and at the same time a cross motion having

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 —  
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been made on the part of the plaintiffs, that all proceedings in that cause should be stayed in obedience to the 42nd section of the statute 12 & 13 Vic. c. 77, his Honour the Master of the Rolls made an order refusing the cross motion; with costs, and the plaintiffs undertaking to file a replication within two days from the date of this order, and to pay Mary De Massy the costs of her motion to dismiss the bill, his Honour made no rule upon that motion, but, in default of the replication being filed within the appointed period, ordered that the bill should stand dismissed with costs as against her, including the costs of the motion.

From this order the plaintiffs now appealed.

Mr. Greene and Mr. Leech, for the appellants.

*Argument.* This case of *Moneypenny v. Gibbings* falls within the first part of the 42nd section of the statute 12 & 13 Vic. c. 77, and accordingly must be stayed. That part of the 42nd section comprises not only suits in which decrees for sale have been made, but also all proceedings for or in relation to a sale, and this is a proceeding having for its object a sale. The latter part of the section gives the Court a discretionary power to "suspend or stay any other proceedings," plainly meaning proceedings not tending to a sale.—[LORD CHANCELLOR. What would be the effect of an order to stay your proceedings so far as they are for a sale?]—To stay the suit altogether, a sale being its main object. The 41st section confers jurisdiction upon the Commissioners to sell notwithstanding any pending proceeding or any decree for a sale, and clears up any doubts as to the meaning of the Legislature in using the words of the 42nd section, which, though somewhat differently placed, are the same as the words in the 41st section. In *Bernard v. Bond* (a), it was deemed necessary to come to the Court for the order to stay the proceedings; but it will be as of course to grant it in any cause where there exist proceedings which seek a sale. Even should the Court consider that it has an option in such cases as the present, or *Bernard v. Bond*, to stay or not to stay the proceedings, this is a proper case for staying them, as under the decree in *Bevan v.*

(a) *SUPRA*, p. 198.

*De Massy*, made since the filing of the bill, the appellants can obtain all the relief which they now require, and it will save expense to stay *Moneypenny v. Gibbings*, which is no longer a necessary suit, but to the costs of which they will be entitled, because at the time of its institution there was not any decree under which they could have obtained relief: *Rankin v. Harwood* (*a*). The offers on their side to stay the suit were made *bona fide* on the usual terms.

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—  
Argument.

The *Solicitor-General* and Mr. *Burroughs*, for *Mary De Massy*.

The construction of the 42nd section is clear, viz., that suits in which a decree for sale has been pronounced are those only which must be absolutely stayed, and that in all other cases, even those tending to a sale, the Court has a discretion to stay or not. On that principle both *Bernard v. Bond* (*b*) and *Danovan v. Bissott* (*c*) were decided. It would be most unjust were this not so, because a plaintiff who had filed an unsustainable bill praying a sale, which bill would, to a certainty, be dismissed at the hearing, might otherwise come in here and stay his suit when an order for sale at the petition of a third person was made at the Incumbered Estates Court, and thus entitle himself to the costs of his suit already incurred. The bill in *Moneypenny v. Gibbings* has been most oppressively filed—a cause in which the same relief which is now asked by the appellants might have been obtained, being actually in the list for hearing at the time. That bill is but a mere transcript of the bill in *Bever v. De Massy*, save that, to get rid of possible objections, it prays an account of the personal estate of William Hamo *De Massy*, which is now abandoned. Mrs. *De Massy* was compelled to answer, otherwise the appellant's bill would have been taken as confessed against her and the minor, and the costs of that most improper suit would have been thrown upon the estate. Now could the Incumbered Estates Court, even though desiring so to do, compel the appellant to pay Mrs. *De Massy's* costs. That Court will not decide any question of liability to costs of proceedings here. This Court will therefore exercise its discre-

(*a*) 2 Phil. 22.

(*b*) *Supra*, p. 108.

(*c*) 2 Ir. Jur. 244.

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tion by refusing to stay *Moneypenny v. Gibbings*, as the effect of staying it would be either to burden the estate with the costs, or to allow the parties to bear their own costs. The order for sale made by the Commissioners does not include all the lands of George Massy.

#### The LORD CHANCELLOR.

*Judgment.*

Perhaps the construction of this 42nd section of the statute 12 & 13 Vic. c. 77, is not very clear. I remain, however, of the same opinion which I expressed in *Bernard v. Bond*, viz., that the proceedings intended to be absolutely stayed are those in a suit where a decree for a sale has been already had. I cannot put any other construction upon the section. The words of the section are:—"And be it enacted, that where the Commissioners shall order the sale of any lands, &c., in respect of which any decree shall have been already made by a Court of Equity for sale, or any proceedings shall be pending in a Court of Equity." The section does not say proceedings towards a sale; "they shall by certificate under their seal notify to such Court the order so made by them, and all proceedings for or in relation to a sale under the decree of such Court shall be stayed." This cannot be extended beyond proceedings for or in relation to a sale under a decree already pronounced, the case contemplated in the opening of the section, viz., "in respect of which any decree shall have been already made by a Court for a sale;" and does not comprise the following case, viz., "or any proceedings shall be pending in a Court of Equity," in which, as well as in the former instance, the notification is also to be made by the Commissioners in order to give this Court an opportunity of exercising the discretion entrusted to it by the second part of the section, namely, "and it shall be lawful for the Court to suspend or stay any other proceedings in such Court, or under any order or decree already made by such Court, as the Court shall think fit." Those words "any other porceedings" are left wide and at large, and are capable of including proceedings towards obtaining a decree for a sale. If it be, as it is said, that the Act is imperative in staying all proceedings towards obtaining a decree for a sale, as well as those upon such a decree

already had, such a construction would involve this Court in great difficulty as to the application of the latter part of the section. For instance, here is a suit conversant about a variety of matters; some of them may be ancillary to a sale, some not so; if the Court were bound to say that all proceedings in relation to a sale must be stayed, the whole machinery of the cause might, and probably would be, entangled in inextricable confusion. Who could tell the steps which had, from those which had not, a bearing upon a sale? I think that the latter part of the section must be read with the first, *reddendo singula singulis*; that will enable the Court to do justice in all cases; the proceedings to a sale will be stayed when a decree for a sale has been obtained; but in every other instance the Court will stay the proceedings or not, at its discretion.

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·MONEY-  
PENNY  
v.  
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—  
*Judgment.*

The question then is, whether the Master of the Rolls rightly used that discretion in refusing in the present case to stay this cause? The plaintiff here admits that under the decree in *Bevan v. De Massy* he might have obtained every thing which he now says is necessary for his case; because all the accounts which he now asks for were directed to be taken in that cause. I must hold that he knew as much then as now, and yet he files a bill for what he now admits that he might have obtained in that suit. That proceeding on his part was plainly wanton and vexatious, and only calculated to create costs. I should indeed have heard more than I have, in order to induce me to think that he should have the costs incurred in such a cause as this; and that was the only object of this motion to stay further proceedings in it. The offer made by the opposite party, to allow this bill to have been dismissed without costs, was very fair and proper. I think the plaintiff has failed alike in his argument that the Court should consider itself bound under the statute *ipso facto* by receipt of the certificate of the Commissioners to stay the suit, or that having a discretion to do so, it ought here to be exercised in his favour. The only alteration which I am disposed to make in the order of his Honour the Master of the Rolls is, that if the plaintiff choose to stay his suit it shall be upon the terms of his paying to all parties their costs hitherto incurred.

1861.

Chancery.

## In the Matter of

JOSHUA O'REILLY and EYRE COOTE O'REILLY,

*Petitioners;*

Cause Petition under the 11th Section of the Court of Chancery

Regulation Act of 1850.

Feb. 12, 25.

Where a petition, in the nature of a special case, is presented under the 11th section of the Court of Chancery Regulation Act, it is not necessary to the maintenance of such a petition that all the parties interested in the question for adjudication should concur in the statement of facts put forward in the petition.

EYRE TILSON (Lord Castlecoote), by will dated the 23rd of October 1826, bequeathed to his executors the sum of £3000, upon trust to invest it in the funds, and to pay the dividends to his sister-in-law Frances, the wife of Philip O'Reilly, during her life, to her sole and separate use; and from and after her decease, and that of her husband, upon trust to pay the same sum of £3000 to and amongst her children in such shares and proportions, and at such time or times as she should by deed or writing, or by her last will and testament, attested by two or more credible witnesses, direct and appoint; and in default of appointment, to pay the same to such children, if more than one, in equal shares, and if but one, then the whole to such only child.

The petition, which was presented by Joshua O'Reilly and Eyre Coote O'Reilly, two of the children of Frances O'Reilly, having stated the foregoing will and the death of the testator shortly after its date, also stated that by articles of agreement of the 9th of April 1834, made between Philip O'Reilly and Frances his wife of the first part, and two trustees of the second part, reciting the will of Lord Castlecoote, and that there was issue of Philip and Frances O'Reilly four children, viz., Henry, Maria; and the two petitioners, that section.

Whether the rights of persons, under such disabilities, should be bound adversely, must be considered in each case.

It is indispensable in every petition under that section that the documents relied on should be fully set out in the petition, or that copies of such documents should be furnished to the Court and to the parties.

Where a petition under that section prayed a declaration of the invalidity of an appointment under a power, and of the validity of a subsequent appointment, Held, that the donee of the power and an appointee (*a femme covert*), whose husband was a party, were necessary parties.

she (Frances), in pursuance of the power reserved to her by the will, directed and appointed that the same sum of £3000, from and after her decease, should be raised, and levied and paid unto her three children, viz., Joshua and Eyre (the petitioners) and Maria, share and share alike; and in case any of them should die before his or her portion should become payable as aforesaid, then the share or shares of him or her so dying should go and remain and be paid to the survivor or survivors of them. That it was by the same articles further recited that Frances O'Reilly was entitled to certain freehold properties therein specified; and in order to make a provision for Henry O'Reilly, her eldest son, and in satisfaction and discharge of any share or proportion he might be entitled to out of the sum of £3000 under the will of Lord Castlecoote, thereby agreed to convey and assign unto the trustees all the freehold properties therein mentioned upon trust, after the deaths of Philip and Frances O'Reilly, for Henry O'Reilly for life, with remainder to his first and every other son in tail male, and in default of such issue, remainder to Joshua, Eyre and Maria O'Reilly, share and share alike.\*

The petition also stated that since the execution of the articles of 1834, Maria O'Reilly married William Pitt Bowler, and that there was not any settlement or disposition of her share or interest in the sum of £3000 ever made by her or W. P. Bowler. That Henry O'Reilly died in October 1838 a minor, intestate, unmarried and without issue.

The petition also stated that Frances O'Reilly, having been advised that the articles of 1804 did not constitute a valid execution of the power vested in her by the will of Lord Castlecoote, by deed poll of the 19th of November 1850, executed in the presence of two credible witnesses, in pursuance of the power conferred upon her by the will of Lord Castlecoote, and of every other power enabling her, directed, limited and appointed the sum of £2950,

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\* By the articles themselves it appeared that there were two freehold properties, of one of which Frances O'Reilly was seised in fee, and of the other in fee to her separate use; and that her husband Philip O'Reilly joined in the agreement to convey both properties to the trustees upon the trusts mentioned in the text.

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part of the sum of £3000, to and amongst Joshua and Eyre O'Reilly, and Maria Bowler, in the following shares, viz.:—to Joshua £1930, to Eyre £1000, and to Maria Bowler £20.

The petition submitted that the appointment under the articles of 1834 was invalid, inasmuch as one of the objects of the power was excluded, and that the appointment by the deed poll of November 1850 was valid, and that the petitioners, namely, Joshua and Eyre O'Reilly, were entitled to the respective sums appointed to them under that deed, and were entitled to a declaration under the 11th section of the Court of Chancery Regulation Act to that effect.

The only respondent to this petition was William Pitt Bowler, who filed an answering affidavit, by which he stated that in consequence of differences between him and his wife (Maria Bowler), they had separated, and that she would not join him in making an affidavit in answer to the petition. He also submitted that the petitioners had not stated such a case as to entitle them to the declaration which they sought, and that they were not entitled to such a declaration inasmuch as they did not seek any relief founded upon it, and because it was uncertain whether, in events which might occur, such a declaration would ever become necessary, and he claimed the benefit of these objections at the hearing as though they had been raised by demurrer. He also stated that he had never seen the documents alluded to in the petition; and as the decision of the case would turn upon them, he prayed leave to refer to them when produced and proved, but professed his willingness to admit attested copies of them if produced to his solicitor within a reasonable time before the hearing. Finally, he relied on the articles of the 9th of April 1834 as a valid appointment to his wife of £1000, which he claimed in her right, and alleged that he married her upon faith of, and relying on, the validity of those articles.

Argument.

Mr. Christian and Mr. Lawless, for the petitioners, contended that the petition was properly presented under the 11th section of the Court of Chancery Regulation Act, and that at all events the Court might entertain the petition under the Act generally, inasmuch as the relief sought might have been obtained on bill; and

they added, that the sanction of the Master on behalf of Mrs. Bowler to this proceeding was not necessary, as she was not a petitioner.

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Argument.

**Mr. Greene** and **Mr. William Smith**, for Mr. Bowler.

The petition does not fall within the 11th section; it seeks no relief, but merely asks for a declaration of the opinion of the Court, and is a *quia timet* proceeding. The Court has no jurisdiction under this section, except where the parties interested in the question concur as to the facts upon which it arises. A special case is in the nature of a special verdict at law, and not an adverse proceeding, such as this. It never was contemplated by the Legislature to convert all hostile suits, in which there exists a conflict as to facts, into a special case under this section. The Court has not under this section any jurisdiction to try disputed facts. The English Act (13 & 14 Vic. c. 35), which is more fully expressed, shows that concurrence as to matters of fact is indispensable. Mrs. Bowler not being *sui juris*, the consent of the Master should, on her behalf, have been obtained before the presentation of this petition. If that consent were required only where the person under incapacity is the petitioner, the proviso as to the sanction of the Master might be always evaded by the presentation of the petition by some party interested who is *sui juris*. The Court has authority to make a declaration of right, although it should not follow up that declaration by granting relief; but it has not jurisdiction to make such a declaration where it cannot give relief upon it. The petition being intituled under the 11th section, the petitioners cannot fall back upon the Act generally.

**Mr. Lawless**, in reply, insisted that there was not a single word in the 11th section pointing out the necessity of concurrence by all parties as to the facts, and observed, that the English Act was more special, and quite differently worded, and that it was not to be presumed that the Legislature, passing those Acts in the same session, and employing on the several occasions such different language, could have meant to introduce several measures.

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O'REILLY.

Judgment.

## The LORD CHANCELLOR.

It is not in my opinion necessary that all parties interested in the question upon which the Court is called upon to adjudicate should concur in the statement of the facts put forward by what is denominated by the 11th section a special case. The Act does not contain any words requiring such concurrence. It gives power to any person (the direction of the Master in the case of persons under certain specified disabilities being first obtained) to present a petition stating any document, facts or circumstances relating to any matter falling within the jurisdiction of the Court by way of special case, and praying for the opinion of the Court upon such special case, and it enables the Court to give judgment on such petition accordingly, and such judgment shall bind all such persons as the Court shall direct, and in default of direction, shall bind all such persons as presented the same. Now, as I have said, the Act contains no words pointing to the necessity of the concurrence of all persons interested. It is framed, I think, with a different intent.

It is contended that where the opinion of the Court is desired in any matter in which any infant, idiot, lunatic or (as here) married woman is interested, the direction of the Master must first be obtained, even although the petition has not been presented on behalf of persons under any of those disabilities. I conceive that if I were to put upon the Act such a construction, a petition under this section in every case in which persons under disability were interested could not be presented by any person without the concurrence of the Master on behalf of the persons under disability, which would involve as a consequence that the Master would not, except in a very clear case, concur in the presentation of such a petition.

The English Act (13 & 14 Vic. c. 35) is more explicit upon the subject of special cases than this Act, but is much more limited in its operation, and does not enter upon the very enlarged legislation of the Irish Act, which was I think intended to supply the declaratory power, the absence of which, in our system of jurisprudence, was regretted. A power of somewhat similar nature exists in the Law of Scotland : *Erskine's Institute*, p. 1004, edition 1838. The proceedings in that country, known as actions of declarator, seem to have

been essentially adverse; and I think the Legislature appears to have intended to introduce here a jurisdiction in character resembling those actions. What difficulty there may be in giving effect to such a jurisdiction remains yet to be seen.

Whether the rights of minors and other persons under disabilities should be bound adversely must be considered in each case; but I should place a very narrow construction upon the Act if I were to require that, in analogy to the English Act, all the parties interested should concur in the statement of facts.

It will be quite indispensable in every petition of this kind that the documents relied on should be fully set out in the petition, or that they should be furnished to the Court and to the parties. There are two questions in the present case for the Court—viz., first, shall the first appointment be declared invalid? secondly, if the first appointment be declared invalid, shall the Court proceed to declare the latter appointment to be valid? There may also be a question of election.

Let the case stand over for production of the deeds relied on, or of attested copies of them.

*Mr. Christian* on this day argued, that inasmuch as the articles of 1834 did not confer any share in the sum of £3000 upon Henry O'Reilly, the eldest son of Frances O'Reilly the donee of the power, those articles were a mere nullity, because the power did not warrant an exclusive appointment: 2 *Sugden on Powers*, p. 238, 6th ed. There was therefore nothing to prevent her from exercising the power again in a valid manner: *Green v. Green*, per Sir Edward Sugden (*a*).

As to the freehold property, which by the same articles she agreed to convey upon trust for Henry O'Reilly as a satisfaction of any share of the sum of £3000 to which he might be entitled, no question of election can arise, because he died a minor in his mother's lifetime, unmarried and without issue; and she has by the deed of 1850 retracted the first arrangement and made a new and valid appointment.

(*a*) 2 Jo. & Lat. 541.

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Argument.

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In re  
o'REILLY.

Argument.

Mr. Greene, for Mr. Bowler, objected that he was the only person served with notice of the petition; that two only of the children of Frances O'Reilly were the petitioners, and that although an affidavit by Mrs. Bowler, the third surviving child, had been recently filed stating her approbation of the petition, yet that she and her mother Frances O'Reilly were not before the Court.

The LORD CHANCELLOR.

Judgment.

I cannot adjudicate upon this case in the absence of the proper parties. What is to prevent Mrs. O'Reilly from executing another deed to-morrow if she please? The only mode of binding her is by serving her with notice. I have considerable doubts whether or not this will be a case in which any declaration of rights will be proper. The donee of this power may, for aught that appears, have done something to validate the first appointment. Let all parties interested be served with notice of this petition. Reserve the question of costs of this hearing and of all other costs. I might entangle this case very much by any declaration of rights. However, I do not at all mean to say at present that it is not within the 11th section of the Act.

1851.  
Chancery.

### HATCHELL v. EGGLESO.

*Feb. 24.*

THIS was a cause petition filed by Emily Hatchell, the widow and executrix of E. H. Hatchell, who died on the 30th of November 1848. The petition stated that Henry Eggleso, being possessed of certain terms of years in land situate in the county of Dublin, under leases respectively bearing date upon the 28th of April 1828, the 12th of May 1837, the 8th of April 1843, and the 29th of December 1843, assigned them by way of mortgage, by an indenture of the 30th of December 1845 (registered on the next day), to E. H. Hatchell for a sum of £1500. That collaterally with the mortgage, Henry Eggleso executed his bond and warrant to E. H. Hatchell in the penal sum of £3000, for which sum a judgment was entered up in the Court of Exchequer as of Michaelmas Term 1845. That in consideration of a further advance of £500, Henry Eggleso, by indenture of the 20th of February 1847 (registered on the 22nd of February 1847), assigned the equity of redemption in the same premises by way of mortgage to E. H. Hatchell, and that the same indenture contained an agreement that the bond and judgment for £3000 should remain as a security for the £500 as well as for the £1500.

The petition also stated that Henry Eggleso took the benefit of the Act for the Relief of Insolvent Debtors in the year 1849.

That upon search in the Registry-office, it appeared by a memorial remaining of record that by indenture bearing date the 6th of September 1848, and made between Henry Eggleso of the first part, Anne Eggleso his wife, of the second part, and George

sides in the mortgage transaction, and denying that the mortgagee had notice of the articles, were allowed to be read at the hearing.

The Court, however, at the instance of the defendant, then made an order allowing both parties to examine witnesses on interrogatories generally, as they might be advised.

Where a person entitled *jure mariti* to chattels real mortgages them, the wife has not any equity to a settlement thereout as against the mortgagee seeking a foreclosure and sale.

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Chancellor of the third part (after reciting the leases already referred to, and certain articles of marriage settlement bearing date the 7th of May 1842, made previously to the marriage of Henry and Anne Eggleso, whereby the premises comprised in the leases of the 28th of April 1828, and the 12th of May 1837, were agreed to be put in settlement on the marriage), it was witnessed that, in order to carry out the agreement entered into on the marriage, so far as it was then possible, Henry and Anne Eggleso, each according to their respective estates, assigned and confirmed to George Chancellor (the surviving trustee in the articles) *inter alia* the several premises comprised in all the leases already referred to, subject however to the two mortgages executed to E. H. Hatchell, to hold during the residue of the respective terms upon trust for Henry Eggleso and his assigns during his life, or until his bankruptcy or insolvency, and from and after any of those events, upon trust to pay the rents and profits of the premises to Anne Eggleso for her separate use; and after the death of the survivor, upon certain trusts for the issue (if any) of the marriage, and if none, or that they should die under twenty-one or unmarried, upon trust for Henry Eggleso, his executors, administrators and assigns.

The petition also stated that the articles of agreement in the foregoing indenture, represented as bearing date on the 7th of May 1842, were not registered until the 8th of September 1848, and that E. H. Hatchell, at the time of the execution of the mortgages, had not any notice of those articles, and the petitioner accordingly insisted on the priority of the mortgages over the articles, and prayed a foreclosure and sale.

To this petition George Chancellor and Anne Eggleso filed an answering affidavit, which stated that the leases of the 28th of April 1828, and the 12th of May 1837, were made not to Henry Eggleso, but to Edward Lawson, who, by his will bearing date the 20th of January 1842, appointed Anne Eggleso (then Anne Chancellor) his sole executrix and residuary legatee; but her right to probate having been disputed, and litigation having ensued, she did not succeed in obtaining probate until June 1843, and her marriage to Henry Eggleso took place while the suit was pending.

The affidavit next stated at length the articles of settlement of the 7th of May 1842, executed previously to the marriage, and referred to in the petition. The purport of those articles was an agreement that the trustees thereof should stand possessed of the leasehold property of Henry Eggleso, and of the terms of years in the premises comprised in the leases of the 28th of April 1828 and the 12th of December 1837, together with the other property to which Anne Eggleso was entitled under the will of Edward Lawson (which last named terms of years and other property Anne and Henry Eggleso thereby covenanted to assign to the trustees so soon as probate of the will of Edward Lawson should be granted to Anne Eggleso), to hold the same upon trust to pay the rents and profits of all the leasehold properties, and the interest, dividends and periodical proceeds of the other property to Henry Eggleso during his life, provided he did not become bankrupt or insolvent, or fail in business; and on the happening of any of those events, or upon his death, upon trust to pay the rents, &c., and periodical proceeds to Anne Eggleso for her life, to her separate use in lieu and bar of dower and thirds; and upon the death of the survivor, upon certain trusts for the benefit of the issue of the marriage; and in default of issue, upon trust for Henry Eggleso, his executors, administrators and assigns.

The affidavit also stated that probate having on the 1st of June 1843 been granted to Anne Eggleso, she acted as sole representative of Edward Lawson with the full concurrence of Henry Eggleso, and that although prior to the deed of the 6th of September 1848, referred to in the petition, there had not been any actual assignment of the trust property to the trustees as stipulated in the articles of settlement, yet that a sum of £3000, part of the assets of Edward Lawson, which came to the hands of Henry Eggleso, was laid out by him in building, finishing, improving and furnishing houses standing upon the lands demised by the four several leases referred to in the petition; and a further sum of £323, further part of such assets, was applied by him in paying off a mortgage upon his leasehold property comprised in the articles of settlement, and that this

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outlay of £3000 and £323 nearly, if not altogether, exhausted the net balance of the pecuniary assets of Edward Lawson, to which Anne Eggleso was, as his residuary legatee, entitled. That Henry Eggleso, while making these outlays, procured her concurrence thereto by alleging that they were for her benefit; and she insisted therefore that in equity he must be deemed, in respect of those sums, a trustee for her and the issue of the marriage; and that she and the issue of the marriage ought, as against him and the petitioner, and all other persons claiming under him (Henry Eggleso) be deemed in equity to have the same lien upon all the leasehold properties as she and the issue would have had upon those monies if they had been assigned to the trustees. She and George Chancellor both denied all knowledge of the mortgages by Henry Eggleso to E. H. Hatchell until long after they were made.

By the affidavit Anne Eggleso also expressly charged that E. H. Hatchell or his solicitor, at the time of the execution of the mortgages, had notice of the articles of settlement of 1842, and she stated certain facts, whence she inferred that the solicitor had such notice of those articles.

The affidavit accounted for the fact of the deed of trust of the 6th of September 1848 having been made subject to the mortgages, by stating that George Chancellor, then having become aware of their existence, was advised that they might affect the life-interest of Henry Eggleso under the articles of settlement of 1842, and therefore required that they should be noticed in the deed of trust; but the respondents insisted that this gave no priority to the mortgages over the life-estate of Anne Eggleso under the articles, especially as E. H. Hatchell was no party to the deed of trust, and Anne Eggleso received no consideration for executing it; and as she had not then any present right to the life-interest, Henry Eggleso not having become insolvent until afterwards.

Both the respondents also insisted that upon Henry Eggleso's insolvency in 1849, Anne Eggleso became and still continued entitled to a life-estate in all the trust funds and properties comprised in the articles of settlement, and that the mortgages were, as against her, fraudulent. They admitted that there was not any issue of the

marriage; and that upon the death of Anne Eggleso, but not until then, the petitioner might be entitled to the relief sought.

Finally, both the respondents offered to prove the facts and charges set forth by them in such manner as the Court should direct, and insisted that the petition should be dismissed, with costs.

On the part of the petitioner two affidavits were filed in reply to the answering affidavit; one by her solicitor, who had been solicitor for E. H. Hatchell in both the mortgage transactions, denying that he (the solicitor) had then notice of the articles of settlement of 1842, and denying all the facts from which the respondents Anne Eggleso and George Chancellor had inferred such notice; and also stating that he (the solicitor) firmly believed that E. H. Hatchell had not any notice of those articles. The other affidavit was made by the solicitor for Henry Eggleso in the mortgage transactions, and denied that he (the solicitor) or any other person to his knowledge had given E. H. Hatchell or his solicitor notice of the articles of settlement of 1842.

*Mr. Brewster and Mr. Frederick Walsh*, for the petitioner.

*Mr. Christian and Mr. O'Leary*, for Anne Eggleso.

There is a preliminary objection to the use by the petitioner of the two affidavits filed on his behalf in reply. Those affidavits have been filed without the permission of the Court, and therefore cannot be now read. That permission cannot be granted until the hearing. From the 12th section of the Court of Chancery Regulation Act, it is plain that not until the hearing has the Court power to "direct" how the evidence is to be taken; and that each case must in the first instance be heard upon the petition and answering affidavit only. The Court may then direct the evidence to be taken by affidavit, or *vivā voce*, or upon interrogatories. It was never intended to give to a party himself the power of foretelling, by means of affidavits, the evidence of persons who may afterwards be called upon to depose either *vivā voce* or upon interrogatories. Were such a system permitted, every witness might be tutored through the medium of an affidavit prepared for him. *Prima facie* the ordinary

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mode of examining upon depositions is to be resorted to. If at the hearing the Court see fit, it has power to order otherwise. The English Act (13 & 14 Vic. c. 35 s. 28) corroborates this view; it enacts that "it shall be lawful for the said Court at the hearing of any cause to receive proof by affidavit." The Irish Act gives liberty "to direct the whole or any part of the evidence to be taken either *vivā voce* on oath before the Court or Master, or upon affidavit, instead of upon interrogatories, or in addition to an examination upon interrogatories." Great inconvenience would ensue from receiving these affidavits in evidence, because upon them the Court would be compelled to hold that the want of notice of the articles of settlement of 1842 was fully proved, and thus those articles would be excluded from the consideration of the Court. Affidavits are not a sufficiently stringent mode of investigating such a question. The feeling of many members of the Profession is, that such affidavits should not be used at the hearing; but that if permitted, counter-affidavits should also be allowed.

**Mr. Brewster and Mr. F. Walsh.**

In the 12th section of the Court of Chancery Regulation Act the words are, that affidavits may be used not merely in any suit or matter "being heard," but "in any suit or matter *pending* or being heard." That word "pending" does not occur in the English Act. It is a matter of discretion at the hearing whether or not the Court will decide the matter upon affidavit. The practice is settled by *Glascock v. Ross* (*a*). Counsel also referred to the case of *Smith v. Constant* (*b*).

**The LORD CHANCELLOR.**

Judgment.

It has been my impression ever since the Court has been acting upon this statute that the affidavits of strangers to the cause are admissible at the hearing. It seems to me to be plain that the object of the statute was to substitute the form of hearing adopted upon petitions before the passing of the Act in lieu of the form

(*a*) 1 Ir. Chan. Rep. 50.

(*b*) 15 Jur. 97.

adopted in causes upon bill and answer, &c. It is now contended in substance that, except in the case of petitions under the 15th section, the only effect of the Act was to change the word "bill" into "petition." I do not read the Act so. It appears to me that its object was to put the rights of the parties in a position for adjudication at as early a period as possible, and for this purpose persons are enabled to apply to the Court by petition. The practice heretofore on petitions was well understood. The party presented his petition to the Court and verified it by affidavit. The respondent was brought before the Court by notice, and supported his case by his own affidavit, and the affidavits of as many other persons as he pleased, and the matter was heard upon the petition and affidavits. The 5th section of the Act no doubt enables the petitioner to verify any petition presented under the Act generally by the short form given in the schedule; but the same section provides that with respect to petitions presented under the 15th section "no costs of any further or additional affidavit in verification shall be allowed, unless specially allowed by the Court;" plainly showing that further and additional affidavits in support of petitions under the Act generally<sup>\*</sup> are contemplated.

The respondent might, if he were so advised, have applied by motion to the Court to stay proceedings, in order that a bill might be filed on which evidence might be taken *viva voce*, or upon interrogatories, because the 12th section enables the Court to give such a direction, not only when a suit or matter is at hearing, but also in any suit or matter pending before it. It is, I conceive, impossible to hold that the course to be adopted on petitions, not under the 15th section, must be according to the forms and solemnities of the old practice, expensive and dilatory as they were. I look upon the Act generally as drawing a line of distinction between proceedings by bill and proceedings by petition, and that much more was intended by it than to change the name of a document. But it is said that the true mode of proceeding is merely to throw down the petition and the answering affidavit, and then that the Court is to decide upon the course to be pursued. I confess that if that were to be the practice, I would think it had been better to have left matters as they were before the Act, leaving the parties to decide

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as to what points they would examine—what they would give in evidence, and whom they would produce as witnesses; slow and expensive, as experience has taught us, that the ancient procedure was.

The 12th section empowers the Court to dispense with interrogatories when it pleases, but does not, in my judgment, declare that in all cases under the Act the evidence is to be taken upon interrogatories, unless the Court shall otherwise direct; and I cannot read that section as amounting to this, viz., that no information is to be given to the Court at the first hearing save what appears within the four corners of the petition and the answering affidavit. On the contrary, it seems to me that either party may support his case by the affidavits of several people if necessary. The Court will then determine whether the case is one in a condition to be disposed of at that stage, and it should then be so disposed of if there do not appear to be any grounds for contending that the facts are not sufficiently before the Court. If they be not before the Court, that is the proper time for pointing out the mode of investigation. But to return to the original system of taking preliminary depositions, would be to do nothing substantially useful to the suitors of this Court.

The procedure by claim in England under Lord Cottenham's Rules is different from that instituted by this Act. There affidavits are, however, allowed upon both sides; and all that I understand to have been decided by V. C. Bruce, in *Smith v. Constant* (a), is, that in a case of disputed facts the Court would not allow the plaintiff to read his own affidavit; and that the affidavit of a defendant is to have the same weight as an answer. The Irish Chancery Regulation Act, however, expressly recognises the admission of the petitioner's affidavit, and there may in this respect be grounds for a different rule as to its effect in evidence, subject of course to the ordinary consideration applicable to the testimony of an interested party. I may observe also on the question of affidavits that the 10th section of the Act contains the words "all affidavits and interrogatories" in the plural number, implying that there may be more affidavits

(a) 15 Jur. 97.

than one on both sides. Inconveniences may arise in the administration of this system, but in the majority of cases it will, I am persuaded, work satisfactorily.

**Mr. Christian** suggested either that the Act could not be carried out, with reference to cases not under the 15th section, until the publication of General Orders under the 31st section; or if it could be carried into effect, that could only be done by the system applicable, not to petitions before the Act, but to suits by bill.

**The LORD CHANCELLOR.**

I am much obliged to **Mr. Christian** for suggesting to me the views which have occurred to him upon this Act. It, however, appears to me that the system which I have mentioned is the proper one to be applied to all petitions under the Act not presented under the 15th section, and that General Orders are not necessary for this purpose.

**Mr. Christian** and **Mr. O'Leary** next argued that Anne Eggleso had an equity to a settlement out of the premises comprised in the leases of the 29th of April 1828, and 12th of May 1837, inasmuch as these had originally been her property; and that she had such an equity against the other leasehold premises in respect of the monies (her property) laid out upon those premises by Henry Eggleso; and in support of both propositions cited *Sturgis v. Champneys* (a); *Hanson v. Keating* (b), and *Newenham v. Pember-ton* (c).

**Mr. Brewster** and **Mr. F. Walsh** denied that she had any such right.

**The LORD CHANCELLOR.**

As to this claim of the respondent **Mrs. Eggleso** to an equity to

(a) 5 Myl. & Cr. 97.

(b) 4 Hare, 1.

(c) 17 Law Jur. N. S. 99; S. C. 11 Jur. 1071, 1 De Gex. & Smale. 634.

1851.  
Chancery.  
HATCHELL  
v.  
EGGLESO.

Judgment.

1851.  
Chancery.  
HATCHELL  
v.  
EGGLESO.  
Judgment.

a settlement, this is not at all the case of a party coming to obtain relief in equity against the right of a married woman. The petitioners merely ask the Court to foreclose a mortgage vested legally in them. If they choose to bring an ejectment, there is nothing to prevent their obtaining possession of the lands. The cases cited for her accordingly cannot govern the present case.

The case therefore turns upon the question of notice. *Prima facie* I should say that the case made by the respondent has been displaced by the affidavits on the other side. But I must remember that this has been done by affidavits only. If the respondents desire to have permission to examine witnesses upon interrogatories, although I doubt that much advantage will result to them by doing so, I think that the safer course will be to allow them to examine whomsoever they think fit.—[Mr. Christian. The plaintiffs should affirmatively prove the whole of their case.]—Notice is the case of the respondents, and on them lies the burden of it.—[Mr. Christian. The plaintiffs should prove consideration, and whatever gives them a *locus standi* in Court.]—I shall give liberty to the parties generally to examine witnesses on interrogatories as they may be advised. Let the names of the witnesses intended to be examined be furnished by each party to the other within ten days, and let publication pass before the first day of next Term.

1850.  
Chancery.

## HUNTER v. KENNEDY.

WALLACE, *Petitioner*; KENNEDY, *Respondent*.

*Dec. 17, 18.*

FROM the decision of his Honour the Master of the Rolls, reported *supra*, p. 148, the present motion on behalf of the petitioner now came on by way of appeal.

The decision in these cases, reported *supra*, p. 148, affirmed on appeal.

Mr. Francis Fitzgerald and Mr. Pilkington for the petitioner.

*Argument.*

Mr. H. Martley and Mr. Wall for the plaintiffs.

In addition to the authorities relied on before his Honour, *Latouche v. Lord Dunsany* (a), and *Fury v. Smith* (b), were cited.

The LORD CHANCELLOR.

*Dec. 18.*  
*Judgment.*

The annuity sought to be recovered in this suit against the lands of Cultra, &c., was granted by Hugh Kennedy to his daughter Dorothea by an indenture of the 18th of July 1831, which was not registered. She, by an indenture of the 19th of July 1831 (being her marriage settlement), with the consent of her intended husband and of her father Hugh Kennedy, the original grantor, assigned the annuity to trustees upon certain trusts. That deed was registered on the 1st of September 1831. By a deed of the 1st of July 1832 Hugh Kennedy mortgaged the lands on which the annuity was charged, to John Wallace for £500. That mortgage was registered on the 30th of November 1847. The question is, whether the marriage settlement has, in respect of the annuity, priority over the mortgage? The deed of the 18th of July 1831, originally creating the annuity, was, as I have said, not registered, therefore so far as the plaintiffs (who became the assignees of the annuity in 1842) could rest upon that deed, they could not contend that it has priority

(a) 1 Sch. & Lef. 137.

(b) 1 Hud. & Br. 735.

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over the subsequent registered mortgage, no notice having been established against the mortgagee ; if there were nothing more in the case, his priority would be indisputable. But the deed of the 19th of July 1831, executed as it was the day after the creation of the annuity, was registered before the mortgage, and having been executed in consideration of marriage, would of itself have the effect of converting the annuity, which was previously merely voluntary, into one which would be good against creditors or purchasers. If that deed had been executed by Dorothea Kennedy only, it is clear that the registry of it would not have amounted to a registration binding the lands as against purchasers, with duly registered deeds of conveyance from Hugh Kennedy. It would have been a good registration of the annuity itself as against persons claiming by different conveyances under Dorothea Kennedy. But the question is, whether, although it be a good registration affecting the lands as between conflicting claimants of the annuity, it is also good against persons claiming other interests in the lands under Hugh Kennedy ? Now, he is an executing party to the deed. It recites in full terms the grant of the annuity, and states the lands of Cultra, &c., upon which it is charged. It purports to convey the annuity, with the consent of Hugh Kennedy, to trustees, and that is followed by a declaration by and between all the parties to the deed, that the trustees shall stand possessed of the annuity upon certain trusts. What is the effect of that deed as against Hugh Kennedy ? Its primary operation is to convey the annuity to the trustees ; for that purpose his consent was unnecessary. The deed of the 18th of July had conveyed the annuity to Dorothea Kennedy, and had given her full control over it. To vest the annuity in trustees, and to make it a good deed against purchasers, the consent of Hugh Kennedy was wholly unnecessary. We must therefore conclude that for some other purpose his consent was obtained ; and on the question now before the Court, the effect of this consent must be looked to as to lands on which the annuity was charged. Does it affect those lands in any way as to persons deriving them under Hugh Kennedy ? It would certainly do so by way of recital, and admission, and estoppel, so as to conclude him and all persons claiming under him. In other

words, it would bind the lands in his hands and in the hands of all persons claiming under him, conclusively by the estoppel. As an admission, the deed is conclusive evidence against him; but it goes farther, and contains an actual agreement on his part, and a contract that the annuity should be vested in the trustees. The annuity is described as binding all the lands enumerated in the deed.

The deed, therefore, amounts in effect to this, as if it had contained a separate operative part, by which Hugh Kennedy had declared and agreed that he would assure the annuity to the trustees *in totidem verbis*, which might be tantamount to a substantially new grant of the annuity.

But not to put the case so high as that; inasmuch as this deed affects Hugh Kennedy, and all persons claiming under him whether by descent or purchase, it cannot be contended that it does not affect the lands. Suppose that the Registry Acts had never been passed, and that in point of fact this deed of the 19th of July was the only assurance of the annuity, and recited a deed of grant which had not any existence; is it not plain that this deed of the 19th of July would bind the lands as against a subsequent mortgagee of Hugh Kennedy, and would have operation and be valid as against him, and so be a deed affecting the lands? The Registry Act, no doubt, uses the word "conveyance:" but it cannot be maintained in argument that a deed is not to require or admit of registry whatever be its operation against lands, unless it be a conveyance of the lands. The Act would be very imperfect if that were so, because if it were held that a deed was not within the Registry Act, the nature and operation of which was to affect the lands, but which did not amount to a conveyance of them, the consequence would be that the deed would not require registration at all, and would bind the lands though unregistered; and really the argument went too far when it was pressed that this deed is not within the operation of the Registry Acts. For as it is clearly binding on the lands to some extent between the parties to it and those deriving under them, if the argument be good, the deed would be binding without registry.

The Registry Act is, however, wide enough to embrace every instrument of any kind, because the words used are "any deed

1850.  
Chancery.  
HUNTER  
v.  
KENNEDY.  
\_\_\_\_\_  
Judgment.

1850.

Chancery.

HUNTER

v.

KENNEDY.

Judgment.

ffecting lands." Here the grantor and all the parties and the lands are named. It is a deed in some degree strictly affecting the lands; it has been registered, and has accordingly, in my opinion, priority over Mr. Wallace's mortgage. The report,\* however, is incorrectly framed, and should be varied by stating, that having regard to the second deed—viz., that of the 19th of July 1831, the plaintiff's demand has priority over Wallace's mortgage. The report must, in this respect, be amended. I overrule the exceptions without costs.

1 Reg. Lib. Gen. fol. 167.

\* The report had declared that the plaintiff was entitled to six years' arrears of the annuity under the deed of the 18th of July 1831, which was unregistered; whereas he should have been declared so entitled having regard to the deed of the 19th of July 1831 also.

1851.

## MURPHY v. SEALY.

Feb. 19.

A petition for the sale of lands had been presented in the Incumbered Estates Court, but no order had been made thereon, and, without the consent of the Commissioners of that Court, a petition under the Chancery Regulation Act was filed in this month) under the Court of Chancery Regulation Act, praying that a mortgage bearing date the 6th of December 1841 might be foreclosed, and also praying an account and sale, and that in the meantime a receiver might be appointed.

The petition stated that the whole of the principal and three half yearly gales of interest were due on foot of the mortgage. That Richard Sealy the mortgagor was in possession of the mort-

Chancery Regulation Act was subsequently presented in this Court on foot of a mortgage of the same lands, praying a foreclosure, sale and account, and that in the meantime a receiver should be appointed. The latter petition charged that the former petition had been presented by the mortgagor in order that he might continue in receipt of the rents until a sale took place, and that in consequence of the arrear of business in the Incumbered Estates Court it was not probable that an order for a sale would be made for a long time. Although at the Bar the mortgagees offered to waive all relief under their petition except the appointment of a receiver, this Court refused to make any order upon their petition and compelled them to pay to the respondent (the mortgagor) the costs of bringing him before the Court.

gaged premises, and that he had lately presented a petition for the sale thereof in the Incumbered Estates Court, that no conditional order had been made on that petition, and that from the number of petitions presented to that Court it would be a long time before the petition could be submitted to the Commissioners, and that the present petitioners verily believed that Richard Sealy had presented his petition for the purpose of delay and to enable him to receive the rents of the mortgaged premises pending the time when an order could be made upon his petition; and that, if a receiver were not appointed over the premises for the payment of the arrears of interest due to the petitioners, they would be put to much inconvenience.

1851.  
*Chancery.*  
 MURPHY  
 v.  
 SEALY.  
 —————  
*Statement.*

*Mr. Exham*, for the petitioners.

The accumulation of business at present in the Incumbered Estates Court is so great that a very long time must elapse before an order for sale can be made upon the petition, and a further time before a sale can take place. In the interim the mortgagor is dissipating the rents, and the creditors are left unpaid. The prohibition in the 42nd section of the 12 & 13 Vic. c. 77, against the commencement of proceedings at law or equity for redemption, foreclosure, or sale, without leave of the Commissioners, cannot apply here, because it cannot be said that "proceedings for a sale" under the Act are "pending," no order for sale, or indeed of any kind, having been made upon the petition. However with a view to meet any objection on this score, the present petitioners are willing, for the time present, to waive all the prayer of their petition except so far as it relates to the appointment of a receiver.

*Argument.*

*Mr. Chatterton*, on the other side insisted that the petition was expressly prohibited by the Act, the leave of the Commissioners not having been obtained to its presentation.

**The LORD CHANCELLOR.**

This case clearly falls within the 42nd section; it is therefore quite impossible for the petitioners to sustain their petition

*Judgment.*

1851.

Chancery.MURPHYv.SEALY.Judgment.

here without having obtained permission from the Commissioners for the Sale of Incumbered Estates to present it. The words of the prayer of this petition are:—" And that in the meantime a receiver may be appointed to receive the rents and profits of the said mortgaged premises." By the "meantime" I must understand "until a foreclosure and sale, &c., take place." So that if the petitioners cannot sustain that part of the case, they are not entitled to a receiver. It is impossible for me to cut up the prayer of the petition in the mode suggested by the petitioners' Counsel. Why have not the petitioners proceeded under the Mortgage Act (11 & 12 G. 3, c. 10) for a receiver only ?

Mr. *Exham* asked that the petition might be allowed to stand over until an application was made to the Commissioners for the Sale of Incumbered Estates, for their sanction to it.

**The LORD CHANCELLOR.**

All that I can now do is to refuse to make any order on the petition. It will be a point worthy of the petitioners' consideration whether, even if they should succeed in obtaining the leave of the Incumbered Estates Court, they could sustain a petition filed before that leave was granted. I must now refuse to grant any order upon it, and the petitioners must pay £5 costs to the respondent for having brought him here.

*2 Reg. Lib. Gen. fol. 54.*

## HART v. CARLETON.

(In the Rolls.)

Jan. 18.

THIS was a petition to show cause against a conditional order for the appointment of a receiver under the Mortgage Act. The petition was dismissed on account of mis-statements in it. At the conclusion of his judgment, his Honor adverted to the construction which had hitherto been put on the Mortgage Act, it having been held that the respondent must present a petition to show cause, and that every application in the matter, however trifling, must be by petition, and said :—

I have been referred by Mr. Reilly to two cases decided in England, which show that it is not necessary to present a petition after the first order made upon a petition, in cases where the Court has, by statute, power to exercise jurisdiction on petition.

*Ex parte a Friendly Society* (a) :—"Upon a motion by Mr. Leach, under the Friendly Society Act (33 G. 3, c. 54), a question arose whether, the Court having once got jurisdiction by petition according to the Act, the subsequent order might be made on motion?" The Lord Chancellor (Lord Eldon) said :—"I have mentioned this to the Master of the Rolls, and we are both of opinion that the jurisdiction is so fixed by the first petition, that the subsequent proceedings may be by motion; and it is not necessary that there should be the expense of another petition. The order must therefore be made."

The other case was decided by the Court of Exchequer—*In the Matter of Sleuringe's Charity* (b) :—"A petition was presented in this matter under the Act 52 G. 3, c. 101, for the directions of the Court with reference to the application of the surplus rents of the charity estates, praying that the petitioners might be at liberty to

(a) 10 Ves. 287.

(b) 3 Mer. 707.

1851.

Rolls.

HART

v.

CARLETON.

Judgment.

lay a scheme before the Master for that purpose, with the other consequential directions. Before the hearing of the petition a reference was accordingly made to the Master. And now, this matter coming on upon motion to confirm the Master's report, the Court doubted whether, by the Act, jurisdiction being given only in the first instance, the subsequent applications ought not also to be by petition. But upon Simpkinson citing *Ex parte a Friendly Society* (a), the Court made the order upon the authority of that case."

I entirely concur in what is laid down in those cases. I never could understand why, the Court having acquired jurisdiction by the first petition under the statute, another petition should be required at a subsequent stage. An express provision was introduced into the Sheriffs' Act to prevent all question on the subject. But as I found the practice settled in cases under the Mortgage Act, I did not wish to alter it, because by doing so I should have interfered with the fees payable to the Lord Chancellor's secretary. By the Chancery Regulation Act he is paid by a salary. I can therefore injure nobody by following the two cases which I have read, and for the future I shall allow cause to be shown on motion, as I think it most desirable that unnecessary expense should be avoided in these summary applications for receivers.

I may observe, that previously to the Court of Chancery (Ireland) Regulation Act 1850, no step could be taken in a minor matter without a petition. Under that statute minors may be made wards of Court by cause petition; and if they were now made wards of Court by a cause petition instead of an ordinary petition, all subsequent orders might be made on motion and without petition, and expense would thus be saved to minors' estates.

The *Solicitor-General*, for the respondent.

Mr. Serjeant *O'Brien* and Mr. *J. M'Mahon*, for the petitioner.

(a) 10 Ves. 287.

1851.  
Rolls.

## CRONIN v. MURPHY.

Jan. 31.

THE bill in this cause was filed for a receiver to recover the arrears due on foot of a rent reserved on a grant in fee. The bill was filed after the decision of the MASTER OF THE ROLLS on a motion for a receiver in the case of *Brady v. Fitzgerald* (*a*); but before the Lord Chancellor's decision at the hearing of the same cause was published (*b*). Answers having been filed, and the plaintiff not having proceeded with the cause—

Mr. *Leahy* moved, under the 82nd Rule, that the bill should be dismissed, with costs, for want of prosecution.

Though a bill has been filed on the authority of a reported case, which is afterwards reversed, the Court has not jurisdiction on a motion under the 82nd Rule, to order that the bill shall be dismissed, without costs.

Argument.

Mr. *Berkely*, for the plaintiff, opposed the motion so far as respected the payment of the costs of the suit, and moved a cross notice that the bill might be dismissed, without costs. He submitted that, under the circumstances, the bill should be dismissed without costs, and cited *Robinson v. Rosher* (*c*).

Mr. *Leahy*, in reply, stated that the bill prayed other relief, besides the mere appointment of a receiver, and a discovery of assets, which the plaintiff alleged would be liable to the payment of rent.

## The MASTER OF THE ROLLS.

This case is very unfortunate in its result, and strongly illustrates the inconvenience and injustice which may arise from not adhering to the maxim *stare decisis*, and altering the practice of the Court. *Manly v. Hawkins* was decided by Lord Plunket, and that decision was acquiesced in until the decision in *Brady v. Fitzgerald*. Sir Michael O'Loghlen repeatedly followed it, and I have myself heard

Judgment.

(*a*) 11 Ir. Eq. Rep. 55.(*b*) 12 Ir. Eq. Rep. 273.(*c*) 1 Y. & Col. 7.

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Rolls.CRONIN  
v.MURPHY.Judgment.

Sir Edward Sugden say that he considered *Manly v. Hawkins* the law of the Court. But the authority of those three eminent Judges was overruled in the case of *Brady v. Fitzgerald*, which, although the case of a fee-farm rent, has in effect overruled *Manly v. Hawkins*. I am, however, of course, bound by the decision of *Brady v. Fitzgerald*. I apprehend I have no jurisdiction to decide the question of costs on this motion. Lord Langdale has in one or two cases intimated his opinion that the Court may decide the question of costs on motion; but I am not aware of its ever having been done in this Court. I must require the plaintiff to file a replication. If he carries the cause to a hearing, it will then be decided whether he was justified in filing this bill on the authority of Lord Plunket, Sir Edward Sugden, and Sir Michael O'Loghlen's decisions. I decline to decide the question of costs, because I consider that I have no jurisdiction to do so on this motion.



#### CORBAN, *Petitioner*; LORD MOUNTCASHELL, *Respondent*.

Feb. 1.

A receiver may be appointed or extended under the Sheriffs' Act, though an order for a sale has been made by the Commissioners for Sale of Incumbered Estates.

A PETITION was presented in this matter to extend a receiver over the respondent's property on foot of a judgment under the Sheriffs' Act. There had been an order for a sale of the property over which the receiver was sought to be extended.

Mr. Brewster moved on the petition, referring to sections 41 and 42 of the Incumbered Estates Act (12 & 13 Vic. c. 77).

#### The MASTER OF THE ROLLS.

Judgment.

The 42nd section of the Incumbered Estates Act does not preclude an application for a receiver under the Sheriffs' Act. The words of the former statute are, "pending any proceedings for a sale under this Act it shall not be lawful for any owner, &c., or any

incumbrancer to commence any proceedings, at law or in equity, for redemption, foreclosure, or sale." This application is not a proceeding for redemption, foreclosure, or sale, and therefore the Court has jurisdiction to appoint a receiver under the Sheriffs' Act. It was held by Sir Edward Sugden that the Court has not a discretionary power to refuse to appoint a receiver under that Act where the case is within the statute. The order for a sale by the Commissioners for the Sale of Incumbered Estates does not take away the jurisdiction of the Court to appoint a receiver under the Sheriffs' Act; and therefore I shall make the order as prayed.

1851.  
Rolls.  
  
CORBAN  
v.  
MOUNT-  
CASHELL.  
  
Judgment.

## READ v. CORCORAN.

Feb. 28.

A RECEIVER had been appointed in this matter over certain lands, the interest in which was afterwards evicted for non-payment of rent. A balance of £37 remained in the receiver's hands.

The petitioner is entitled to be paid the costs of the appointment of a receiver out of a fund realised by him in priority to the landlord's claim for rent.

*Mr. Exham*, for the petitioner, now moved that said balance should be handed over to his solicitor (after deducting the costs of passing the receiver's account) in part payment of the costs of the appointment of the receiver.

Argument.

*Mr. Gresson*, for the landlord, contended that his claim for rent was paramount to all other claims, and should be paid in priority to receiver's costs.

The MASTER OF THE ROLLS thought that the costs of the appointment of the receiver, by which the fund had been realised, were in the nature of salvage costs, and should be paid before all other demands.

Judgment.

1851.  
Bankt. Court.

In re CHARLES JENNINGS, a Bankrupt.  
Ex parte BELFAST AND COUNTY DOWN RAILWAY CO.

*(Bankruptcy Court.)*

*April 15.*

Where a judgment is not tainted with fraud, the assignee cannot rely on a mere defence at law, which the bankrupt had neglected to make. The consideration for the judgment is always subject to investigation.

The minute-book, made evidence by the 8 Vic. c. 16, s. 98 (Companies Clauses Consolidation Act), may be transcribed or made from rough minutes taken at time of the meeting.

Railway calls, made payable by instalments, cannot be enforced.

The twenty-one days' notice of a call, required by 22nd section of same Act, must be exclusive of the first and last days.

The abandonment of part of a Railway is no defence to a claim for calls; nor is the non-subscription of the *prescribed* capital a defence.

A Railway Company proving against the estate of a bankrupt for calls must, according to the universal principle in bankruptcy, deduct the price or value of the shares from the amount of their claim, or give up the shares for the benefit of the creditors of the bankrupt.

bankrupt, whether on a judgment or otherwise, I continue of the opinion intimated during the argument—namely, that the assignee standing in the shoes of the bankrupt cannot avail himself in this Court of a defence at law which the bankrupt had neglected to make, particularly when the judgment itself or the consideration of it was not tainted with fraud.

1851.  
Bankt. Court.  
In re  
JENNINGS,  
a Bankrupt.  
—  
Judgment.

The amount due on the judgment or other demand is always subject to strict inquiry, and the principle is exemplified in this very case. Thus, the action was brought against the bankrupt for the first and second calls, and the first (amounting to £45) was paid by the bankrupt, and there is an admission to that effect in the schedule to the affidavit of debt; but if this admission had not been made by the Company it would have been open to the assignee to have proved that payment and to have had it deducted from the amount claimed. Again, in the same schedule, £1. 16s. 3d. is charged for interest on the first call from the day it was payable to the date of entering the judgment; but as the principal of the call itself was paid and allocated as such by the Company, and as the judgment contained no distinct count for interest, it appears to me impossible that this portion of interest can be allowed—not that it was necessary to have a distinct count for interest when the principal was also to be recovered; for then the interest, as in other cases, would have been added by the Court or the jury. To the extent therefore of the portion of this claim covered by the judgment, it appears to me that it must be admitted, deducting however the sum of £1. 16s. 3d. for interest on the first call, together with the interest at £4 per cent. on that sum which is charged against the estate by the claimants. As to the right of this Court to investigate in the strictest manner the consideration of every judgment, whether by confession or otherwise, I shall content myself with referring to *Ex parte Marson* (a), decided in 1837, and *Ex parte Mudie* (b), decided in 1842.

The residue of the Company's claim consists of the further calls, with interest thereon, from the 3rd to the 9th inclusive, amounting to about £550, and Counsel for the assignee most justly required that the Company should prove strictly the three proposi-

(a) 2 Dea. 245.

(b) 13 Mon., Dea. & De Gex, 66.

1851.

*Bankt. Court.*

*In re  
JENNINGS,  
a Bankrupt.*

*Judgment.*

tions which the 27th section of the Companies Clauses Consolidation Act, 8 Vic. c. 16, makes sufficient, and therefore also necessary for the Company to prove, viz.—first, that the bankrupt, at the time of making those calls, was the holder of those twenty shares ; secondly, that those calls were in fact made ; thirdly, that the prescribed notice thereof was given.

The first of these propositions has been clearly established, not only by the production, from the proper custody, of the sealed register, made evidence by the 28th section of that Act, but by the production and proof of the contract deed dated the 9th of June 1845, and also by the deposition of the bankrupt himself. The second of those three propositions, viz., that those calls were in fact made, involves two others, namely, the evidence to establish the making of the calls, and the legality of the calls when so proved. By the 98th section of the same Act, the Directors are required to cause notes, minutes or copies of all orders and proceedings of the Company and of the Directors to be duly entered in books to be kept under their superintendance, “and every such entry shall be signed by the chairman of the meeting, and such entry so signed shall be received as evidence in all Courts and before all Judges, without proof of the meeting having been duly convened or held.” Accordingly the Secretary of the Company did produce their minute-book duly signed by the chairman, and proved from it the making of every one of these calls ; but it appearing that this minute-book was transcribed from a rough minute-book made by him of the proceedings at each meeting (which was also produced not signed by any chairman), it was objected that the signed minute-book was not the proper evidence, nor the book intended to be kept under the 98th section. No authority was cited on either side upon this point, and in consequence I was obliged to give the question much consideration, and had determined to receive the signed minute-book as the proper evidence, principally because the section does not require that the minute-book should be kept contemporaneously with the proceedings, nor that it should be signed by the chairman at the meeting (which would often be impossible), nor within any precise time afterwards. But in the course of the investigation which I felt it my duty to

make into the law on the entire subject, I found that the question has been long since *res judicata*. The principle was decided in the *West London Railway Company v. Bernard* (*a*), and in *Miles v. Bough* (*b*), and is distinctly so stated in the 6th edition of *Wordsworth on Railways*, pp. 91, 92. But it was further objected to the third, fourth, fifth and sixth calls, that they were made payable by instalments, and therefore could not be enforced, and to sustain this proposition Mr. *McBlain* cited the *Ambergate Railway Company v. Coulthard* (*c*), in all the reports of which case the judgment of the Court, as reported, fully sustains the proposition.

1851.  
Bankt. Court  
In re  
JENNINGS,  
a Bankrupt.  
—  
Judgment.

In 10 *Law Jour.* p. 313, Rolfe, B., is represented as saying:—"This is making two calls by means of one resolution." Pollock, C. B.:—"The transaction amounts in substance to making two calls by means of one resolution." In the *Jurist*, the Court is reported to have said, "that a call payable by instalments could not be enforced, and that the making of one in such a form was an attempt to make two calls by one resolution." The report in 6 *R. C.* p. 218, is to the same effect, and gives more distinctly the argument of Counsel, which is often (particularly when the judgment is concise) a good commentary. It will appear that the argument most relied on was the illegality of making a call payable by instalments. I was surprised that the objection had not been earlier made, for the *Ambergate case* was only decided on the 1st of June last; but in my opinion the principle had been determined long before, in the *Stratford Railway Company v. Stratton* (*d*), decided in 1831, in which, though the several calls made at the same meeting amounted each to the utmost limit, yet this is not once alluded to by Counsel or the Court. The decision was, that the calls being made all at one time, were irregular; and the principle is so stated in the last edition of Mr. *Wordsworth's* book, p. 92. But I avow that my own mind was not satisfied by those decisions, which seemed to have turned upon arguments of convenience, and not on any broad and clear principle. I therefore considered myself

(*a*) 3 *Railway Cases*, 649.

(*b*) *Ibid.* 668.

(*c*) 14 *Jur.* 625; S. C. 19 *Law Jour.* N. S. 311, and 6 *Railway Cases*, 218.

(*d*) 2 *B. & Ad.* 518.

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JENKINGS,  
a Bankrupt.**Judgment.*

bound to investigate the question as if it were *res integra*; and I am now convinced that the true solution is to be found in the doctrine of powers. Those are vast statutable powers, conferred upon individuals for private benefit and advantage, though combined, or expected to be combined, with great public advantage; and in order that the exercise of those powers should affect the rights of others, even parties to the deed or contract, the terms and conditions of the power must be strictly pursued. By the 6th section of the special Act (9 & 10 Vic. c. 87), £5 per share is the greatest amount of any one call which the Company may make on the shareholders; £20 the utmost aggregate amount of calls made in one year upon any share, and three months at the least the interval between successive calls. Each of these conditions is equally essential to the validity of the call; and it is only such calls, so made, that the Company have a power to enforce by action under the 25th, 26th and 27th sections of the Companies Clauses Act. And this at once unfolds the principle why a call, payable by instalments, cannot be enforced, namely, because the instalments (which are really calls, no matter by what name they may be designated) are not made at the prescribed intervals, which is a condition equally essential as that they should not exceed the prescribed amount, or any of the other conditions required by the special Act, or by the consolidated Acts. The moment this principle is arrived at, all difficulty in determining the validity of acts done under those statutable powers ceases, and arguments derived from a balance of convenience or inconvenience on the one side and the other fall to the ground at once. Therefore, upon the express authorities above referred to, as well as my own deliberate conviction as to the true construction of those Acts, I ~~must~~ order that the third, fourth, fifth and sixth calls shall be struck out of the present claim.

To the third call a further specific objection was made, viz., that the necessary notice was not given,—“Twenty-one days’ notice at the least,” required by the 22nd section of the Companies Clauses Act, must exclude both the *terminos a quo et ad quem*. This call (that is, the first instalment) was payable on the 1st of March 1848, and the letter containing the notice thereof was not

put into the Post-office at Belfast until the evening of the 9th of February, which (though the year was leap-year) would not give, in my opinion, the necessary notice. It was insisted on the part of the Company, that the notice published in the newspapers prescribed by the 17th section of the special Act was sufficient; but considering this section in connexion with the 22nd and 138th sections of the same Act (8 Vic. c. 16), it seems to me impossible so to hold.

To the seventh, eighth and ninth calls two general objections were made—first, that the Directors had in fact abandoned the completion of this Railway; that only seventeen miles of it were made; that the three years prescribed by the 24th section of the special Act for the compulsory purchase of land had expired, and that the five years prescribed by the 25th section for the completion of the Railway would expire in June next, the special Act having received the royal assent on the 26th of June 1846; but this defence, independently of the observations already made as to the doctrine of powers, involves considerations not capable of adjudication in this Court, or perhaps in any Court, and which perhaps can be determined only by a general meeting of the Company in that *forum domesticum* provided by the Railway Acts; and on this point I refer to *The London and Birmingham Railway Company v. Wilson* (a); *Same Company v. Fairclough* (b). The other objection to the last three calls, namely, that the *prescribed* capital never had been subscribed, seems of a more definite character. By the special Act the capital of the Company was to be £500,000, divided into ten thousand £50 shares, and of these it was proved by the Secretary that no more than about 7,700 had been subscribed. And if the Company can enforce by action payment of calls when more than one-fifth of the capital is not represented by any proprietors, where is the limit to be fixed? No authority on either side was cited in the argument, but I found that the principle of this objection was distinctly stated as law in the 5th edition of *Wordsworth on Railways*, p. 396, and in *Chambers and Patterson on Railways*, p. 494.

(a) 6 Bing. N. C. 135. (b) Ibid. 270; S. C. 1 Rail. Cas. 530.

(c) 1 Moo. & M. 151.

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 Bankt. Court.  
 In re  
 JENNINGS,  
 a Bankrupt.  
 Judgment.

1851.

Bankt. Court.In re  
JENNINGS,  
*a Bankrupt.*Judgment.

In each book *The Norwich, &c. Railway Company v. Theobald* (*c*) was cited in support of the position; but this case, in my opinion, does not sustain it as a general proposition, the question in it having turned entirely upon the terms of the special Act. Attempts have been made to rely on this defence by special plea, as in the cases already cited from 6 *Bing.*, and also in *The Wicklow and Waterford Railway Company v. Logan* (*a*); but this was merely on the question of allowing several pleas, and the validity of such a defence does not appear to have been yet decided. If it be considered with reference merely to the balance of convenience or inconvenience on the one side or the other, it would, in my opinion, be impossible to arrive at any satisfactory result. What shall determine the smallest amount of subscribed capital sufficient to entitle the Directors to enforce payment of calls, or the minutest *deficit* of the *prescribed* capital which shall disentitle them from so doing?

It is obvious that if the Directors have the power to enforce the payment of calls when only a trifling proportion of the prescribed capital is subscribed, proprietors may be compelled to pay up the full amount for which they have made themselves respectively responsible, not only in much larger calls, but also more rapidly than they had bargained for. By the special Act, section 8, this Company cannot exercise their power to borrow on mortgage "until the whole of the capital of £500,000 shall have been subscribed for, and one-half thereof actually paid up." And by the Lands Clauses Act, s. 10, 8 *Vic. c. 18*, the whole of the prescribed capital must be subscribed before it shall be lawful to put in force any of the powers in relation to the compulsory taking of land.

Is there no similar restriction on the compulsory powers of the Directors for enforcing the payment of calls? I can discover no solution for those difficulties, except the principle already referred to, namely, the doctrine of powers. Has the special or any of the general Acts made this condition necessary to the exercise of the power of enforcing the payment of calls by action?\* It seems to

(a) 19 L. J. N. S. 259; S. C. 14 Jur. 347.

\* Vide 8 *Vic. c. 16*, s. 90, to which the learned Commissioner here referred.

me not, and therefore I must order that the claim of the Company shall be allowed also for the seventh, eighth, and ninth calls, with interest.

I do not think that the letter from the solicitor of the Company, offering on the part of the Directors to accept £50 from the bankrupt in discharge of his liabilities, and that the shares should be forfeited, is any defence; not that I agree in the objection, that it is void as being a mere *nudum pactum*. I shall not carry that principle (or rather rule, for I could never understand the principle of it) beyond the limit to which it is restricted by modern well considered cases. But it does not appear that this letter was formally adopted by, or binding on the Company, and the bankrupt did not perform his part of it, for the £50 was plainly to have been paid at once in cash; and the assignee, even if he could lawfully pay that sum without a consent meeting of creditors, has no right to force it now on an unwilling party. But it is not totally devoid of consideration, for it stipulates for an absolute forfeiture of the shares, and thus naturally brings me to the only remaining question—a perfectly novel one—namely, how are the shares in the present or any similar case to be disposed of? It is generally supposed that the forfeiture of Railway shares under those Acts is absolute, and in the nature of a penalty. But this is a mistake. It is a statutable lien on, or *quasi mortgage* of, the shares as a further and special security for the calls due—entitling the Company to sell the forfeited shares to pay the arrears due thereon, with interest and the attendant expenses, but not for one farthing more; and this will clearly appear from sections 29 to 35 of the statute 8 Vic. c. 16, relating to the forfeiture of shares.

The 34th and 35th sections place this beyond a doubt; the former enacting that the Company shall not sell or transfer more of the shares than will be sufficient, as nearly as can be ascertained, to pay the arrears then due with interest, and the expenses attending such sale and declaration of forfeiture, and that the surplus on such sale (if any) shall, on demand, be paid to the defaulter; to which the 35th section adds, that if payment of such arrears, with interest and expenses, be made before the actual sale, then the

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shares shall revert to the proprietor as if such calls had been duly paid. And this mode of considering the forfeiture of shares is established in *The Great Northern Railway Company v. Kennedy* (*a*), and is fully recognised in the last edition of *Wordsworth*, p. 110. The 140th section of the same Act entitles the Secretary to represent the Railway Company in bankruptcy in all respects, as if the claim or demand made had been that of the Secretary and not of the Company. Is there any thing in those Acts to exempt a Railway Company or their officer from the universal principle, which obliges every claimant on the estate of a bankrupt, holding a security from the bankrupt alone, to deduct from his claim or demand the price or value of that separate security, or to abandon the security altogether, and bring it into the estate for the general benefit? Railway shares are personal property, and may be mortgaged.

Suppose that the bankrupt in the present case, being the holder of twenty shares in the Great Southern or any other Railway, had mortgaged them to the Belfast and County Down Railway as a security for those' calls now claimed, could that Company have proved their present demands without first deducting from it the value or the price of the shares so mortgaged, or bringing them into hotch pot for the benefit of the creditors generally? The length to which this principle has been carried with respect to shares will appear from *Ex parte Connell* (*b*), and therefore before the precise sum, for which the present demand is to be allowed, can be ascertained or any dividend paid, the Company must determine whether they will altogether abandon those twenty shares for the general benefit, or have them sold, and the produce or their value, as ascertained with the consent of the assignee and the Court, deducted from the amount of their claim as above limited, and the dividend struck on the balance.

(a) 6 Railway Cas. 5.

(b) 3 Dea. 201.

In the Matter of  
**MARTIN SHERIDAN, a Minor, by FRANCES SHERIDAN,**  
 his mother and next friend, *Petitioner* ;  
**The Rev. PETER CANNON and six others, Respondents.**

*April 28.*

THIS was a petition under the Court of Chancery Regulation Act, filed on the 25th of November 1850, stating that Martin Sheridan, the grandfather of the petitioner, was entitled to a freehold interest in premises in the town of Castlebar, and by will bearing date the 25th of June 1832, "devised all his property to his sons Martin and Michael in equal shares (subject to certain charges), and that his son Martin should pay his son Michael £10 per annum during his life; and that the testator thereby declared that the said property could not be mortgaged, sold off, or in anywise embarrassed, but from year to year to be given up, clear of any charge or arrears whatever, to the surviving heirs; and in case any of his two sons should die without issue, the other and his heirs to enjoy the entire property; and in case both his sons should die without issue, his nearest of kindred to have it."

That the testator died, and upon that event both his sons Martin and Michael entered into possession of the premises in Castlebar, and the petitioner submitted to the judgment of the Court whether Martin and Michael took more than life estates under the will.

That Michael intermarried with Frances Sheridan, and that the petitioner was the eldest son of the marriage, and heir-at-law of Michael.

The petition also (*inter alia*) stated the recovery by five of the

service of notice of filing the petition and interrogatories upon some of the respondents, and without any notice to the other respondents, a decretal order obtained on such hearing was set aside, with costs.

*Sembler*—It is not a sufficient notice of setting down a cause petition for hearing to state that Counsel will, on behalf of the petitioner, move on the petition "on the first opportunity."

Where interrogatories have been annexed to cause petitions, the respondents are, under the 9th section of the Court of Chancery Regulation Act, until the publication of General Orders under the 31st and 32nd sections to the contrary, entitled to two months' time to file affidavits in answer to such interrogatories; and such cause petitions cannot be set down for hearing until the lapse of two months from the service of notice of filing the interrogatories.

Where interrogatories had been annexed to a cause petition which was set down for hearing within two months after

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*Statement.*

respondents of a judgment in Trinity Term 1834 for £417 against both Martin and Michael Sheridan, on foot of a bond given by the testator for monies due by him to those respondents as "the Chapel Committee of Castlebar."

That Martin, having great influence over his brother Michael, who was a person of improvident and intemperate habits, induced him to assign, by deed of the 12th of November 1838, without consideration to Martin (who was in great pecuniary embarrassment, and wanted to raise money), all his (Michael's) *life interest* in the property, and the £10 annuity.

The petition next stated the execution by both Michael and Martin of a deed in the month of December 1838, which deed was executed to the respondent Cannon as a trustee, in anticipation of Martin's bankruptcy, for the purpose of creating certain charges on the premises in favour of some members of his family, and that this deed was antedated as of the 30th of October 1832, and that two judgments were recovered against Michael and Martin in November 1838 for the same purpose.

That on the 21st of May 1839, Martin and Michael executed a mortgage to the Chapel Committee of Castlebar for £621. 3s. 10d., including the judgment obtained by them for £417.

That in 1840 Martin became bankrupt, and an assignee was appointed of his estate; and that the Chapel Committee, and Martin and his assignee, formed the design of persuading Michael to execute a deed, assigning away all his interest in the premises, and that Martin, at the instigation of the Chapel Committee and his assignee, imposed on Michael, who at first refused to sign the deed, which Martin took with him ready engrossed; but Michael being persuaded to go into a public-house and drink there, was at length induced to sign it, being then *inops consilii*, and having received no consideration for signing it, save a sum of £5. That this deed\* purported to bear date the 26th of April 1844.

The petition also referred to various matters as evidence that this

\* This deed purported also to be made between Michael Sheridan of the one part, and the assignee of Martin Sheridan of the other part; this was not stated in the petition.

deed was fraudulently obtained, and stated that Michael, having, in consequence of intemperance, been deprived of his situation as Excise officer, and been left without the means of subsistence, drowned himself on the 24th of August 1848.

The petition also stated that the premises had been nominally managed by the assignee since the bankruptcy of Martin in 1840; but that really the Chapel Committee were in possession, and ought to be charged as mortgagees in possession; and that a part of the premises were sold in the Court of Bankruptcy in 1842, and that the Chapel Committee then purchased a part thereof to the amount of £500, and entered into possession.

That the Incumbered Estates Court had, upon the petition of Martin's assignee, made a fiat of the 23rd of October 1850, for the sale of another part of the premises; but the fiat was made without prejudice to the present petitioner's rights, and reserving all questions as to the validity of the deed of the 26th of April 1844, as to which the present petition alleged that it was untruly stated in the assignee's petition that the consideration was, that Michael should be released from certain debts mentioned in that deed.

The present petition prayed that the petitioner might be declared entitled to an undivided moiety of the premises devised by the will of his grandfather from the 24th of August 1848, being the day of the death of Michael. That the deed of the 26th of April 1844 should be set aside as fraudulent and void as against the petitioner; that an account might be taken of the rents, &c., of the premises, by whom received, and how applied, and an account of all charges and incumbrances affecting the premises, and for such further relief, &c.\*

To this petition several interrogatories were annexed, some of which each of the respondents was required to answer. There were seven respondents named, viz., the Reverend Peter Cannon, trustee of the deed of November 1838, the assignee of Martin

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 v:  
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Statement.

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\* This petition was verified by the mother and next friend of the petitioner (a minor), not in detail, but in the short form given in the schedule to the Court of Chancery Regulation Act. Whether this be a good verification, *quare, et vide supra*, p. 21, *In re Griffith*.

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Sheridan, and the five members of the Chapel Committee of Castlebar.

Notice of the filing of this petition and copies of the interrogatories were served upon the assignee of Martin Sheridan and on Murphy, one of the Chapel Committee, on the 14th of December 1850, and were on the 20th of that month served upon the respondent Cannon. Upon the four members of the Committee (besides Murphy), although nominally respondents, no such notice or interrogatories were served.

On the 13th of February 1851, notice was served upon the assignee of Martin Sheridan, that Counsel on behalf of the petitioner would "on the first opportunity" move on the petition.

The petition having appeared in the Lord Chancellor's List on the 14th of February 1851, was then called upon, and Counsel for the petitioner applied to have it postponed, inasmuch as six clear days, as required by the General Order of the 8th of January 1851, had not elapsed since the service of the notice upon the 13th of February. The Lord Chancellor desired that it should stand at the bottom of the list; but no notice of this postponement was given to the respondents. The petition was not again called on until the 25th of February; but it appeared in the list frequently in the interval between the 13th and the 25th. On neither of those days was there any appearance for the respondents. Upon the latter day, upon hearing the petitioner's Counsel, an order was made declaring that the petitioner was entitled to an undivided moiety of the premises devised by the will of his grandfather, and became so entitled upon the 24th of August 1848, being the day of the death of his father Michael Sheridan; and it was also ordered that the deed of the 26th of April 1844 should be set aside and declared fraudulent and void as against the petitioner, and that, notwithstanding that deed, he was entitled to the absolute interest in the said moiety from *the said 26th day of April 1844*; and that the Master should take an account of the rents, &c., of the premises from *the said 26th day of April 1844*, and by whom the same were received, and how applied; and also that he should take an account of all charges and incumbrances affecting the premises

On behalf of the assignee of Martin Sheridan, and the Rev. Mr. Cannon and Murphy, the present motion came on upon a petition, praying that the foregoing order of the 25th of February 1851 might be set aside as irregular, the case having been set down before the time allowed to the respondents to answer had elapsed, and without some of the respondents having been served with notice; and that the respondents should be at liberty forthwith to file affidavits in answer to the interrogatories, as also affidavits in defence.

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Statement.

In support of this last named petition, affidavits were filed by Mr. Meldon, who had been solicitor for the assignee of Martin Sheridan in the bankruptcy matter, and was in the present case solicitor both for him and for the Rev. Mr. Cannon and Murphy. Those affidavits stated many of the facts already mentioned, and that immediately upon hearing that those respondents had been served with notice of the petition and with copies of the interrogatories, he instructed Counsel to prepare answering affidavits, and was then advised that the respondents would have two months to answer, and therefore that the petition could not be heard before Easter Term, and that he heard nothing further of the matter until the 15th of February, when his client the assignee sent him a copy of the notice served on him upon the 13th of February, which he was advised by Counsel was in effect only a setting down of the petition for Easter Term, and that he rested satisfied that this was so, more especially because he knew that several of the respondents had not yet been served with any notice of the filing of the petition, &c. He also stated his total ignorance of the fact of the case being in the Lord Chancellor's list, and his belief that the notice of the 13th of February was intended to mislead, and that the respondents had a *bona fide* case on the merits.

On the other side an affidavit was filed by the solicitor of the petitioner, denying that the notice of the 13th of February was intended to mislead, or that he knew that Mr. Meldon was solicitor for any of the respondents to this petition, and that he (the deponent) was advised that "inasmuch as he could have an account against the mortgagees in the event of his setting aside the deed to

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the assignee of Martin Sheridan, such assignee was the only party necessary to be served in the first instance, and that if he succeeded in setting aside that deed, it would be time enough to serve the other parties and bring them into the office for the purpose of having the account taken on foot of the mortgages." That he had caused Murphy and Cannon to be served, because they were cognizant of the circumstances attendant upon the execution of the deed of the 26th of April 1844, and that he had reason to believe that the clerks of Mr. Meldon were aware of the petition being in the Lord Chancellor's list for hearing.

Argument.

Mr. Brewster and Mr. Christian (with whom was Mr. F. Walsh), for the respondents.

The decretal order of the 25th of February 1851 has been most irregularly obtained, and ought to be set aside. The 9th and 10th sections of the Chancery Regulation Act (13 & 14 Vic. c. 89) require that the practice as to petitions, to which interrogatories are annexed, shall be the same as upon a bill filed, until and except so far as it shall be otherwise provided by General Orders made under the 31st and 32nd sections. No such orders having been made, the respondents were, in accordance with the former practice, entitled to two months to answer the interrogatories, and of course the petition could not be properly set down for hearing until that time had elapsed. Here the assignee and Murphy were served with notice of the petition upon the 14th of December, and Mr. Cannon was not served with such notice until the 20th of December, and yet the notice of setting down the petition is given on the 13th of February, before the two months had elapsed, even as against the respondents first served. To four of the Chapel Committee no notice whatever is given either of the filing or setting down of the petition, and yet they, in conjunction with Murphy, are by the petition sought to be charged as mortgagees in possession.

The Court never will allow an order to stand, thus irregularly obtained upon a petition raising such important questions, as—first, the construction of the will of Martin Sheridan the elder; secondly, the validity of the deed of the 26th of April 1844; thirdly, whether

as against the Chapel Committee, who are purchasers for valuable consideration, that deed should be set aside; fourthly, the validity of the proceedings in bankruptcy, so far as they affect Michael Sheridan's moiety of the premises. Even if no interrogatories had been appended to the petition, it was irregularly brought on upon the 14th of February, six clear days not having elapsed after the service of the notice of the 13th of February, as required by the General Order of the 8th of January 1851, issued as to the hearing of cause petitions during the Sittings in and after Hilary Term. The Court, in order by a severe example to discourage such irregularity, ought to set aside the order of the 25th of February, with costs; and this it may do, although we have not asked for costs by our notice of motion: *Powell v. Cockerell* (a). The reason assigned in the affidavit of the petitioner's solicitor for not serving four of the Chapel Committee is untenable and absurd. The order of the 25th of February is on its face repugnant, because it begins by declaring the petitioner entitled to a moiety from his father's death on the 24th of August 1848, and afterwards declares him entitled to an absolute interest in that moiety from the 26th of April 1844, and directs an account of rents from that day.

*Mr. Andrews* and *Mr. Lawson*, with whom was *Mr. J. G. Holmes*, for the petitioner.

The order of the 25th of February has been regularly obtained, more than fourteen days having elapsed from the service of notice, upon the last of the respondents who were served, of filing the petition and interrogatories, that being the period required by the General Order of the 8th of January 1851, with which we have complied. The Chapel Committee it was unnecessary to serve, because the petition does not pray that their mortgage should be set aside, but that the deed of the 26th of April 1844, which does not affect them, should be set aside. It cannot be contended that there was any surprise on the assignee or his solicitor; the case appeared in the list for several days antecedently to the 25th of February. The insertion in the order of the 25th of February of "26th of

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Chancery.  
SHERIDAN  
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(a) 4 Hare, 572.

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April 1844," for "24th of August 1848," is a mere clerical error. At all events, the neglect of the solicitor for the respondents disentitles them to obtain costs, even should the Court set aside the order.

#### The LORD CHANCELLOR.

It is quite clear that the order of the 25th of February 1851 has been most irregularly obtained, and must be set aside. The particular order of the Court of the 8th of January 1851, as to setting down cause petitions, was never intended to apply to cases in which interrogatories were annexed to petitions, nor to annul the 9th section of the Court of Chancery Regulation Act (13 & 14 Vic. c. 89), under which it is plain that respondents are entitled to two months' time within which to answer interrogatories appended to petitions. If the petitioners annex such interrogatories to their petitions, they must abide the consequences. It has here been frequently stated that it is irregular to bring forward such cases until two months have elapsed from the service of notice of filing the petition.

Even had there not been interrogatories annexed in the present case, the notice of setting down the petition would not have been quite regular; it is, that Counsel will move on the petition "on the first opportunity." That is not sufficiently explicit. Notice of the postponement of the case, when brought forward on the 14th of February, should also have been given to the respondents; it was with a view to the giving of such a notice that I desired the case to be placed at the end of the list.

It cannot be said that Mr. Meldon was as much on the alert as he ought to have been in allowing such an order as that of the 25th of February to pass *sub silentio*. The case seems to have appeared for many days previously in the printed list; although, perhaps, as he was not served with notice of its being there, he was not bound to know that it was this particular case. It may, for aught that he was informed of by the other side, have been a different case between parties of the same name. But in truth there seems to have been a strange and unaccountable abstinence from communication on the part of the solicitors on both sides.

However the matter may be as between the solicitors, the rights of the suitors are not to be thereby affected, and therefore this

order of the 25th of February, containing on its face certain incongruities in point of dates, and having been obtained irregularly and without notice to the respondents, and without notice even of the filing of the petition to some of the respondents, all of whom are named in the margin of the order, is *prima facie* an unjust order (I do not say that when the case is regularly heard it may not be a very proper order to make); it must accordingly be set aside, with costs.

1851.  
Chancery.  
 SHERIDAN  
 v.  
 CANNON.  
Judgment.

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#### HAMILTON *v.* HAMILTON.

*April 28.*

MR. WILLIAM SMITH moved for leave to enrol the decree pronounced in this cause by his Lordship more than six months previously.

The application for leave to enrol a decree pronounced more than six months previously may be made either by motion or petition.

The LORD CHANCELLOR.

Should not such an application be made by petition? It is so made more usually than by motion.

Mr. William Smith said that it might be made by motion also.

The LORD CHANCELLOR, having consulted the Registrar (Mr. Long) and the Clerk in Court (Mr. Darley), asked whether notice had been served upon all the parties to the suit, and, having been answered in the affirmative, granted the motion.

*Judgment.*

1851.  
Chancery.

**FLORINDA LIVESAY, Wife of EDWARD LIVESAY,  
by WALTER BLAKE, her next friend, Petitioner ;  
RICHARD MAXWELL and EDWARD LIVESAY, Respondents.**

*April 28.*

Where notice that a cause petition was "set down in the list of causes for hearing before the Lord Chancellor under the Court of Chancery (Ireland) Regulation Act, 1850," was served upon a respondent, and the petition was set down in the list of causes under the 15th section, the Court being of opinion that such a notice was likely to mislead, refused to make a summary order under that section, and transferred the petition to the general list.

THIS was a cause petition, under the Court of Chancery Regulation Act, filed on the 22nd of March 1851. The petition was on the 24th day of March set down in the list of cause petitions under the 15th section of that Act. The following notice, signed by the petitioner's solicitor, was served, but not through the notice office, upon the respondent Richard Maxwell :—

"Take notice, that this cause petition has been set down in the list of causes for hearing before the Lord Chancellor under the Court of Chancery (Ireland) Regulation Act, 1850.

"Dated this 24th March 1851."

The respondent Richard Maxwell filed an affidavit on the 14th of April, and gave notice thereof on that day to the petitioner's solicitor.

Mr. John O'Hagan, for the petitioner, now moved for a summary order under the 15th section of the Act.

Mr. R. B. McCausland, for the respondent Richard Maxwell, said that there was not any notice given conformable to that required by the Rules of Court\* of the 8th of January 1851 and

\* The latter Order was as follows :—

"Wednesday, 2nd April 1851.

"LORD CHANCELLOR.

"Directions by the Lord Chancellor for setting down cause petitions under the statute 13 & 14 Vic., for hearing, in the ensuing Easter and Trinity Terms, and the Sittings after Term.

"Cause petitions may be set down for hearing, or for further hearing or directions, before the Lord Chancellor, at any time before Monday the 28th day of April, to be heard in Easter Term, and the Sittings after Term, on days to be appointed by the Chancellor, when the general list of causes shall have been dis-

of the 2nd of April 1851, nor any such docket served as those Rules prescribed; and also objected to the sufficiency of the verification of the petition, which was verified by the next friend of the petitioner in the short form given by the Act—a form which could only be adopted by the petitioner himself: *Hall v. Stubbs* (a).

1851.  
*Chancery.*  
 LIVESAY  
 v.  
 MAXWELL.

The LORD CHANCELLOR.

The notice, which has been given, is not the proper style of notice in cases where a summary order is sought for under the 15th section of the Act. The present notice is calculated to mislead the respondents; it is that the case is "set down in the list of causes for hearing" under the Court of Chancery Regulation Act. I must therefore transfer the case to the general list; but as I do not understand what the opposition is for, I shall not give the respondent any costs.

*Judgment.*

(a) 2 V. & B. 354, et vide *In re Griffith*, supra, p. 21.

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posed of, and at any time before Monday the 2nd day of June, to be heard in like manner in Trinity Term, and the Sittings after Term.

"Cause petitions, of which notice has been served in Ireland, are not to be set down for hearing until the expiration of fourteen days from the time of service, or of the last service if served on more than one respondent, and exclusive of the day on which the notice was served.

"The Lord Chancellor, on the application of Counsel for the petitioner, will fix the time for setting down and hearing any cause petition of which notice has been served out of the jurisdiction of the Court, or where answers to interrogatories have been required.

"A docket stating the title of the petition, the names of the parties served with notice of it, the dates of such service, and the names of the solicitors of any respondents who have filed affidavits, is to be lodged with the Registrar on setting down the petition for hearing, together with a copy of the petition, and no petition will be heard until the expiration of six clear days from the day of service of notice of the petition being set down.

"Applications for summary orders under the 15th section of the Act will be heard by the Lord Chancellor every Saturday during Term and the after Sittings; a docket of the title of the petition and a copy of it being lodged with the Registrar on or before the preceding Thursday.

"MAZIERE BRADY, C."

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The order of the 8th of January 1851 was similar to the foregoing order, except that, instead of the 28th of April and 2nd of June, the 27th of January was named, and that it was applicable to cause petitions set down for hearing in Hilary Term and the Sittings after that Term only. The Court was not sitting when the above petition was set down, and did not sit in the interval between that time (the 24th of March) and the present (Easter) Term.

1850.  
Chancery.

**In the Matter of**  
**WILLIAM GOODE, MARY GOODE and ELIZA GOODE,**  
**Minors;**  
**And in the Matter of**  
**ELIZA GOODE, a Minor, and of MARY GOODE, late a Minor.**

*Nov. 25.*

Where a petition on behalf of an infant is presented by a solicitor who is a stranger to the infant, even although the Master should find that the petition is a proper one, and for the benefit of the infant, the Court will not award out of the infant's estate to the petitioner any costs except costs out of pocket. HENRY GOODE of Claremount died in the year 1835, leaving three children, namely, William, Mary and Eliza, all under age. By his will, bearing date the 3rd of May 1832, he bequeathed to those three children a debt of £8000, then due to him, "to be divided amongst them in equal shares at such time as the youngest survivor of them should attain twenty-one, the residue of the interest, over and above whatever might be necessary for their proper maintenance and education, to be put to interest to accumulate for their advantage in whatever manner his executors might think most advisable for such purpose." The testator also bequeathed the proceeds of his farming stock, furniture, &c., to his son William, and bequeathed certain other property to all three children, and appointed as his executors William Bigoe Buchanan and his (testator's) brother-in-law James Grant. By a codicil the testator appointed his sister-in-law Catherine Grant sole guardian of his children.

And where such a petition was presented by a solicitor praying investigation into the conduct of a testamentary guardian with respect to the property of an infant, and the Court referred the matter of the petition to the Master, who found that the petition was a proper one, and for the benefit of the infant; and although the Court was not satisfied with the conduct of the guardian, and the circumstances of the case were such as to warrant suspicion, yet as the petitioner had not previously ascertained that none of the relatives or friends of the infant would present such a petition, the Court refused to grant out of the minor's estate even costs out of pocket to the petitioner.

The Lord Chancellor of Ireland has power under the statute 4 & 5 W. 4, c. 78, s. 7, to appoint a receiver over the estate of a minor upon petition, and without the filing of a bill for that purpose.

Where there is a testamentary guardian, the law (14 & 15 Car. 2, c. 19, Ir.) authorises him to manage the estate of the infant, and the Court will not interfere with or remove him unless it be absolutely necessary so to do; whether the filing of a bill for this purpose would, previously to the Court of Chancery Regulation Act (13 & 14 Vic. c. 89), have been necessary; *quare?*

By another codicil he stated that the former codicil "was written in a fit of illness, and he therefore cancelled it by drawing his pen across it, and appointed Catherine Grant an *additional* guardian to his children," and bequeathed to her, so long as she continued unmarried, an annuity of £34 per annum.

Mr. Buchanan renounced the executorship, and probate was granted to Mr. Grant.

In the year 1836 Catherine Grant employed Messrs. Dunne and Meade as her solicitors to take the necessary steps to have the minors made wards of Court, and those gentlemen presented a petition for that purpose in her name.

By an order, bearing date the 6th of October 1836, made on that petition, it was referred to the Master to inquire and report what was the nature and amount of the fortune of the minors; whether their father had appointed Catherine Grant or any other persons guardians of the minors, and whether the persons appointed were willing to undertake the duties of that office; and the Master was ordered to approve of fit persons to be appointed guardians of the persons and fortunes of the minors, or of their fortunes only, as might be necessary, and that he should report in what manner it was proposed that the minors should be maintained and educated, and with whom they should reside, and whether any and what proceedings were necessary to be taken touching their property, and to have it secured for their benefit; and it was also ordered that notice of the proceedings should be given to their nearest relatives.

The Master, by his report, bearing date the 30th of March 1837, found that James Grant, as executor, had sold and converted into money the farming stock, furniture, &c., as directed by the will, and had the proceeds in his hands, but the amount thereof the Master was unable to ascertain, and he found that the minor William was entitled thereto, and that the debt of £8000 had been paid subsequently to the execution of the will, and that the personal property (over and above the farming stock, furniture, &c.) of the testator at the time of his death consisted of £7917. 15s. old £3½ per cent. Government stock, and £1000 new £3½ per cent. Government stock standing in his name in the books of the Bank of Ireland, and that

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*Statement.*

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James Grant as executor had on the 29th of April 1836 transferred those sums of stock into his own name, in which they still remained, and that the three minors were entitled thereto in equal proportions under the will; that they were also entitled to a certain chattel real, and that under the will of their grandfather they were entitled to a sum of £2000 consols, and to a reversionary interest in certain property under the will of their great uncle. He also found that the minor William was at school, and that the two other minors resided with James Grant, and that the combined effect of the will and codicils was to appoint W. Buchanan, James Grant and Catherine Grant, guardians of the minors, and that they were willing to undertake the office, and he submitted to the Court whether it was requisite for him to go further into the matters directed by the order.

No further proceedings were taken with respect to this report either with a view to its confirmation or otherwise.

The minor William died in the year 1840, being then seventeen years of age, and his share in the property of his father devolved upon the surviving minors.

James Grant alone (but with the concurrence of W. Buchanan) continued to act as guardian of the minors and as executor of the will of their father, and as such from time to time to make investments of the minors' property.

Mr. Robert Maunsell, a solicitor of this Court, having been employed by Catherine Grant to obtain payment from James Grant of the annuity of £34, bequeathed to her by Henry Goode, and also of a legacy of £800, charged for her by her father's will on all his property, wrote to James Grant on the 23rd of June 1849, requiring payment of both demands. James Grant, by his reply on the 25th of June following, disputed the amount due on foot of the annuity, and with reference to the £800 legacy said:—"I have had occasion before now to make out a return for your inspection of all the property I possessed of every sort, both under my father's will and in my own right, which you returned to me after a close investigation, admitting its total worthlessness." This referred to representations made by James Grant when applied to by Mr. Maunsell as solicitor

for the committee for winding up the affairs of the Agricultural Bank, for the payment of certain demands, to which James Grant as a shareholder was liable, and from the discharge of which he frequently excused himself as above. Mr. Maunsell, as solicitor for the Earl Fitzwilliam, in October 1847 had repaid to James Grant a sum of £10,000 (of the minors' monies) previously lent by him on a mortgage of certain estates belonging to the Honourable Frederick Ponsonby, which were purchased by the Earl Fitzwilliam.

On the 8th of July 1849, the minor Mary Goode attained her full age.

Mr. Maunsell, under the above state of facts, advised Catherine Grant to lay information thereof before the Lord Chancellor, in order that proper steps should be taken for the protection of the minor Eliza's property. However, the inadequacy of Catherine Grant's pecuniary means having prevented her from doing so, Mr. Maunsell himself presented a petition to his Lordship, calling his attention to the above facts, and stating his (Mr. M.'s) belief that the minor's money had been invested in insufficient securities by James Grant, and suggesting that James Grant was not a proper person to be intrusted with the control of her property, upon which he (Mr. M.) inferred from the above facts that James Grant was wholly dependent; and stating that he (Mr. M.) believed the property of Mary and Eliza Goode to exceed £600 per annum, and that he deemed it to be his duty as one of the solicitors of the Court to submit the case to his Lordship's consideration.

On the 22nd of October 1849, his Lordship made an order upon that petition, referring it to the Master to inquire into the matters stated in it, and into the circumstances and condition of the property of the minor, and whether any steps or proceedings should be taken with regard thereto; and that the Master should report whether the petition was a proper petition to be presented for the benefit of the minor.

On the 3rd of August 1850, the Master made his report, finding (*inter multa alia*) that William Goode, during his lifetime, and Mary and Eliza Goode, had been carefully maintained by James Grant, and properly educated in a manner suitable to their condition

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in life; and that James Grant as executor possessed himself of all the property, real and personal, of Henry Goode at his death, amounting to £9170; and that with regard to seven of the securities, on which the minors' property had been invested by James Grant he (the Master) was not by any means satisfied as to their sufficiency (three of those securities were mere promissory notes), and that two of the securities were inconsistent with the trusts of the will of Henry Goode, which directed investments at interest.

The report also stated that the Master could not find that any part of the minors' property had been lost, but that he was unable to find whether or not the securities were actually insufficient; and it found that James Grant had not produced before the Master, or kept, any account of the annual or other receipts, or disbursements of the minors' fortunes, save so far as regarded the investments thereof set out in the schedule to the report.\*

The report also contained a finding as to the annuity of £34 bequeathed by Henry Goode to Catherine Grant, which is not material to the present case; and it found that the present income of the property of Mary and Eliza Goode was at least £600 per annum, and its present total bulk, as invested and admitted by James Grant, was £14,400; and that James Grant was not possessed of any independent means or property, and did not appear to have had any at the time of Henry Goode's death; but the Master added, that he did not find that James Grant was in insolvent circumstances, or that he was dependent on the property of the minor. The Master also found that inasmuch as all the securities for the minors' property had been taken by James Grant in his own name, and did not show by recital or otherwise that it was their property, he ought to execute a deed of trust in respect of such property for Mary and Eliza Goode, and lodge that deed in the Master's office; that James Grant had undertaken to execute such a deed, and under those circumstances the Master found that it would not be necessary that any other proceedings should be taken in relation to the property.

\* A schedule, appended to the report, contained a statement of the various securities on which the monies had been invested by James Grant.

The concluding passage in the report was :—"I find and submit to your Lordship that the petitioner, having acquired information of the matters aforesaid from Catherine Grant, who was one of the testamentary guardians of said minors, and who appears to have had no means whatever to prosecute said petition, and having been himself acquainted with the repayment of the said sum of £10,000 by Earl Fitzwilliam, and of his (James Grant's) limited means (if any), from his own admission, and having regard to the trusts of the will of the father of said minors, he (the petitioner) was, as a solicitor of this Court, justified in having laid same before your Lordship in order that proper steps, if necessary, might be taken for the protection of said property, and, under the circumstances, and considering the importance of having such declaration of trust as aforesaid executed by said James Grant, I find that said petition, in my opinion, was a proper petition to have been presented, and for the benefit of said minor."

Mr. Maunsell having applied by petition, praying that the foregoing report might be confirmed, &c., and that James Grant should be ordered to pay out of the minors' property to Mr. Maunsell the costs incurred by him on the petition, the order of reference of the 22nd of October 1849, and the report ; and Counsel having been heard in support of and against the application, his Honour the Master of the Rolls refused to make any rule thereon.

The case now came by way of appeal before the LORD CHANCELLOR.

**Mr. T. Lefroy** (with whom was **Mr. T. Rice Henn**), for Mr. Maunsell.

The jurisdiction of the Court over Mr. Grant was on the argument of this case in the Rolls denied, on the ground that he was not such a guardian as fell within its control ; but whether a guardian be appointed by the Court, or whether he be a testamentary guardian, or a guardian by *tort*, the Court, being intrusted with the Crown's prerogative in respect of infants, has absolute authority over him : *Lady Teynham v. Lennard* (a), quoted by *Hargrave*,

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(a) 2 Bro. P. C. 539.

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GOODE.*Argument.

*Co. Lit.* p. 88, *b*, note 16, a case which was determined on petition; to the same effect are *Ex parte The Earl of Ilchester* (*a*) ; *Ex parte Salter* (*b*) ; *Ex parte Mountford* (*c*) ; *Villa Real v. Mellish* (*d*) ; *Hanbury v. Walker* (*e*) ; *Noel v. Somerset* (*f*) ; *In re McCullochs* (*g*) ; *Knellers minors* (*h*), and *Chambers on Infancy*, p. 160, where the cases are collected. It has been in some cases asserted that in order to obtain a receiver, or remove a testamentary guardian, a bill should be filed : *Ex parte Whitfield* (*i*) ; *O'Keeffe v. Casey* (*k*). We do not, however, pray for such relief, but that the Court should throw its protection over the property of the minor, which is in the hands of one who must be deemed an unsuitable person for the office of guardian, whether regard be had to his own pecuniary situation, his not having kept accounts, or his injudicious investments. In *Goodall v. Harris* (*l*) the Court, upon a mere motion for the purpose, and where there was neither bill or petition filed, interfered and took a minor from the care of one testamentary guardian, and committed her to the care of another, and bound over the former to answer an information, to be exhibited against him by the Attorney-General. The Court is bound to order payment to Mr. Maunsell of his costs ; his conduct has been highly meritorious, and has accordingly met with the approbation of the Master, who has reported the petition to be a proper one, and for the benefit of the minor.

The *Solicitor-General* and Mr. *Rollestone*, for Mr. Grant.

Constructively Mr. Grant is testamentary guardian of the minor, and with such guardians the Court rarely interferes, never indeed, except in cases of gross misconduct, *ex. gr.*, such as the guardian in *Goodall v. Harris* was guilty of, viz., marrying the minor to his own

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| ( <i>a</i> ) 7 Ves. 348.                           |                                     |
| ( <i>b</i> ) 3 Bro. C. C. 500 ; S. C. 2 Dick. 769. |                                     |
| ( <i>c</i> ) 15 Ves. 445.                          | ( <i>d</i> ) 2 Swanst. 533.         |
| ( <i>e</i> ) 3 Chan. Rep. 59.                      | ( <i>f</i> ) Cited 1 Ves. sen. 160. |
| ( <i>g</i> ) 6 Ir. Eq. Rep. 393.                   | ( <i>h</i> ) Cited 1 Ves. sen. 160. |
| ( <i>i</i> ) 2 Atk. 215.                           | ( <i>k</i> ) 1 Sch. & Lef. 106.     |
| ( <i>l</i> ) 2 P. Wms. 560.                        |                                     |

son, a person in a low condition of life; but the report of the Master exonerates Mr. Grant from any malversation in his office, and on its very face shows his *bona fides* and zeal for the interest of the minors; their property under his care having grown in value from £9170, its primary amount, to £14,400. Mr. Maunsell's interposition was therefore unwarrantable, it was an attempt to usurp the functions of *parens patriæ*. At all events he, being a mere volunteer, should not receive costs, and should be left to reap the reward of his exertions for the minors in the feeling that he has performed his supposed duty towards them as an officer of the Court. He should not have acted on the information of Miss Grant alone, but ought to have inquired amongst the other friends and relatives of the minors; had he done so he would have learned that his present proceedings were wholly unnecessary; both Mr. Buchanan and Miss Mary Goode have made affidavits in which their disapprobation of Mr. Maunsell's interference is strongly expressed. It cannot be maintained that the minor Eliza Goode is a ward of the Court. The Master's report in 1836 never was confirmed or acted on. The Court could not on petition supersede the authority of the testamentary guardian: *In re McCulloch* (a); *Ex parte Ricards* (b). The property of the minor is not therefore under its control, and accordingly there is not any fund out of which costs can be awarded to Mr. Maunsell.

Mr. Lawless, for Mary Goode, late a minor, opposed the granting of any costs out of her estate, and insisted that she being adult at the time of the filing of Mr. Maunsell's petition, was quite competent to look after her own interests, and the Court had not any control over her property.

Mr. T. Rice Henn, in reply.

The intervention of strangers as *amici Curiae* on behalf of infants is upon proper occasions encouraged by the Court: *Eyre v. Lady Shaftesbury* (c), where Sir Joseph Jekyll observes:—"The law is

(a) 6 Ir. Eq. Rep. 398.

(b) 3 Atk. 518.

(c) 2 P. Wms. 103, 119.

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particularly favourable to and careful of an infant's interest, and though the infant himself cannot bring an account against the guardian until his coming of age, yet a third person may bring a bill for an account against the guardian even during the minority of the infant." Similar observations are attributed to Lord Hardwicke in *The Earl Pomfret v. Windsor* (a); and in *Whittaker v. Marlar* (b) Lord Thurlow declared "that no degree of mistake or misapprehension would be sufficient to charge a *prochein ami* with costs. Whoever will stand forward in that character on the behalf of infants is to be encouraged to every possible extent while he can be supposed to intend the infant's benefit." A stranger acting *bona fide*, though unsuccessfully, for an infant, is entitled to costs out of the estate of the infant: *Chambers on Infancy*, p. 752. That Mr. Maunsell's petition was for the benefit of the minor, is incontrovertibly established by the order of reference upon it, and by the Master's report which so finds, and gives conclusive reasons for that finding. At any other opinion it will be plainly seen that it was impossible for him to arrive, when it is recollected that the securities were all taken in the name of Mr. Grant alone, and of what a precarious nature many of those securities are, especially the three last named in the schedule, being mere promissory notes; and the fact that Mr. Grant is confessedly a man of no property; that he kept no accounts of disbursements; that the information as to his unfitness for the office was derived from his own sister; that Mr. Maunsell had personal cognizance of the large sum of £10,000 having been paid to Mr. Grant for the minors; and that Miss Grant was incapable of bearing the expense of presenting a petition. It would be unjust that Mr. Maunsell should be compelled to bear any share of the costs of the investigation in the Master's office, for, if the Court had in the first instance refused to make any order upon the petition, those costs would never have been incurred; but the order of reference having been made, from all costs incurred in virtue thereof, Mr. Maunsell ought in fairness to be indemnified, the Master having found that the petition is a proper one and for the benefit of the minors.

(a) 2 Ves. 482.

(b) 1 Cox, 286.

In addition to the authorities already cited to show that the Court has jurisdiction to make minors its wards upon petition and to control and appoint guardians of the property as well as of the persons of infants, there may be adduced the observations of Sir J. Jekyll, in *Byre v. Lady Shaftesbury* (*a*), that "Lord Somers has often said that this Court should be always open for petitions; and orders on petitions in regard to the guardianship of infants have not only been provisional, but in some cases decisive as to the right of guardianship." And again:—"Also in the case of a testamentary guardian, such guardian having a plain legal right upon the words of the will, and the whole case arising thereon, there can be no need of a bill in equity—no proofs of either side are requisite or can avail, and therefore the matter is properly determinable upon a petition without a bill." And for the same purpose may be mentioned the cases of *Ex parte Thomas* (*b*), *Ex parte Kent* (*c*), *Wellesley v. The Duke of Beaufort* (*d*), *In re Christie* (*e*), *Ex parte Angell* (*f*), which show that the presenting of a petition brings the property of an infant under the jurisdiction of the Court. To the argument that Mary Goode being an adult, costs cannot be awarded out of her moiety of the property, it may be answered, that she does not become entitled to it under the will until her sister attains twenty-one. And even were this not so, still the jurisdiction of the Court would attach upon Mary Goode's property until she is discharged from the state of wardship in which the petition and order of reference in 1836 have placed her and her sister: *Austen v. Halsey* (*g*).

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Argument.

#### The LORD CHANCELLOR.

There is a great deal in this case upon which I think very little doubt can be entertained. I should be very sorry to throw any difficulty in the way of persons who *bona fide* desire to inform the Court of any thing material to the interest of the property or persons

*Judgment.*

(*a*) *Ubi sup.*

(*b*) 1 Amb. 146.

(*c*) 8 B. C. C. 88.

(*d*) 2 Russ. 21, *et vide* S. C. 2 Bl. N. S. 128.

(*e*) 9 Sim. 643.

(*f*) 13 Sim. 258.

(*g*) 2 Sim. & St. 123, n.

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of minors under its charge; and I have no doubt that these ladies were made, and still are, wards of this Court by the petition and proceedings thereon. But the extent of the power of the Court in such a case, it does not appear very necessary to consider; that it has jurisdiction over the person of a minor so placed, there is no doubt, and it is clear that it has so over the property of a minor to a great extent. The Court constantly commits the guardianship of minors under such petitions to third persons, and, if it be necessary, under the great seal; and whatever uncertainty may have existed as to its jurisdiction to appoint a receiver of the estate of a minor upon petition was removed by the statute 4 & 5 W. 4, c. 78, s. 7, which expressly authorises such appointment. Where there is a testamentary guardian, the law (14 & 15 Car. 2, c. 19, Ir.) authorises him to manage the estate, and the Court will not interfere with or remove him unless it be necessary so to do, and such a proceeding may require that a bill should be filed.

I have said that the Court will not discourage persons who come forward to inform it as to the minors' interests. It is every-day's practice to file bills on behalf of minors, and sometimes in the name of a friend or relative—sometimes in that of a stranger. The only inquiry which the Court makes is, whether or not the proceeding is for the benefit of the infant? Nor does the fact that the *prochein ami* happens to be a solicitor or officer of the Court disqualify him from acting as such *prochein ami*; while on the other hand he is not, because he is such a solicitor or officer, warranted in inquiring into the state of the property of all minors. Every case must be judged of by its circumstances; and when a gentleman in that position, having made inquiry as to the rights of the minor, and as to the disposition of his friends or relatives to inform the Court on the subject, comes forward and satisfies the mind of the Court that his interference was for the benefit of the minor, he shall receive every just encouragement from this Court. But a solicitor or officer of the Court thus investing himself with the character of a trustee cannot be allowed to make costs for himself. He would properly in such a case come within the rule that a solicitor, acting for himself in a case where he was placed in a character of trust, should only be

entitled to charge for his costs out of pocket—a principle which in itself would operate as probably a sufficient check to any idle or unnecessary interference. In the present case, had this demand in respect to costs not been carried beyond a claim by Mr. Maunsell for his actual expenses, the Court would perhaps not have heard any more of this proceeding.

Had the necessary preliminary inquiries been made by Mr. Maunsell, the proceeding having been certified by the Master to have been for the benefit of the minors, it would have been a matter of course that he should have been paid at least his actual expenses incurred out of any fund, the property of the minors, over which the Court could exercise control; and I do not say that if any further proceedings were to be taken in this case, means could not have been found so to reimburse those expenses. But looking to all the facts of the case, I cannot think that the course adopted by Mr. Maunsell has been taken with all the due deliberation and inquiry which should have been exercised. There were, undoubtedly, very strong circumstances to create suspicion. The minors were in 1836 found to be entitled to considerable property. Three persons appear to have been guardians of the minors, and approved of by the Master; the report does not say whether of their persons or their property. I take it that they were so of both. Instead of all three managing the property, the whole of it, being money, is found to have been ever since and to be still in the hands and dominion of one of them, viz., Mr. Grant. There is nothing of which the Court takes more care than that this should not happen. Who can say, if Mr. Grant died to-morrow, into whose hands this money might fall? Mr. Grant and the other parties appear to have acted under some mistaken notions as to how the property should have been dealt with. For fourteen years these funds are vested in a single individual, and might have been made away with easily.

Owing to these circumstances, so calculated to arouse suspicion, having come to the knowledge of Mr. Maunsell, and having regard to the letter of Mr. Grant, he could scarcely have supposed Mr. Grant to be a proper person to be intrusted with the entire dominion of the minor's property. The facts warranted inquiry; but Mr.

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—  
Judgment.*

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Judgment.

Maunsell did not make it sufficiently. He does not appear to have communicated with the eldest of the minors, who has attained her full age, and who makes no complaint, nor with Mr. Buchanan, who would perhaps have taken advice in the matter; and although I fully acquit Mr. Maunsell of any attempt to meddle intrusively, and on the contrary am sure that he acted from a very proper sense of duty arising from the suspicious nature of the facts; yet, considering that he was a stranger to the minors, I do not think he ought to have passed over all the members of the family without having more clearly ascertained their wishes, and communicated with them. I think that this property has been mismanaged, and cannot regard it as altogether in a safe position; and I should have expected that the Master would have reported, not as he has done, that no further proceedings should be taken, but rather that some should be taken in order to secure the fund, as it might be placed in jeopardy by the death of Mr. Grant. I must again say that I acquit Mr. Maunsell of every improper motive; but considering that he did not make sufficient inquiry within his power before instituting this proceeding, I think that the order of his Honour the Master of the Rolls must remain undisturbed. Convinced, however, that Mr. Maunsell's proceedings were *bona fide*, and looking to the facts of the case as regards the manner in which this property has been dealt with, I give no costs against him of the original motion or of this appeal, and the deposit must be handed back to him.

**Ex parte WALDRON,**  
In the Matter of the Renewable Leasehold Conversion Act.

(*In the Rolls.*)

Nov. 16, 28.

THIS was a petition presented by Patrick Waldron for a fee-farm grant under the 12 & 13 Vic. c. 105. The petition stated, that by lease of the 15th of June 1798, Charles Fitzgerald demised to Gerald Osbrey, his heirs and assigns, a dwelling-house and two water mills, called the Mills of Rathgar, together with certain lands, for three lives, with a covenant for perpetual renewal, at the yearly rent of £220. That a renewal of the said lease was granted by the respondent Charles Fitzgerald junior, in whom the lessor's interest was then vested, to the petitioner, in whom the lessee's interest was vested, on the 29th of August 1833. That two of the lives named in the renewal were dead; that the petitioner, pursuant to the above Act, caused a draft of a fee-farm grant, containing the same covenants as in the original lease, and the renewal thereof, to be furnished, in September 1849, to the respondent's solicitors for their approval; that the respondent returned the draft altered by them, alleging that delapidations had been committed on the premises.

In a fee-farm grant under the Renewable Leasehold Conversion Act, the Court will frame the covenants in such grant so as not to vary the existing rights and liabilities of the parties. Therefore, where it was alleged that since a former renewal there had been a breach of a covenant to keep the premises in repair, the covenant inserted in the fee-farm grant was to keep in repair the premises as they were at the time of that renewal.

The respondent's solicitor made an affidavit, in which he stated that the chief value of the premises consisted of the two mills, and that to insure the preservation of them, the original lease contained the following covenant:—That the said Gerald Osbrey "shall and will from time to time, and at all times during the continuance of this demise, well and sufficiently repair, amend, preserve and keep the said demised premises, and all houses, buildings, hedges, ditches and improvements whatsoever, now made, erected, or built, or which hereafter shall be made, erected, or built on the said demised premises, or any part thereof, and the mears and bounds thereof, in good and sufficient repair, order and condition; and

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at the end, or other sooner determination of this demise (which shall first happen), shall and will peaceably and quietly leave, surrender, yield, quit and deliver up the quiet and peaceable possession of the same unto the said Charles Fitzgerald, his heirs and assigns, in like good, sufficient and tenantable repair, order, and condition." The affidavit further stated that, some time after the petitioner became seized of the premises under the renewal, he caused the mills to be pulled down, and that the premises had been thereby deteriorated in value, and that the respondent was apprehensive that in consequence of the pulling down of the said mills the rent, payable by the petitioner or his assigns out of the premises, would cease to be so well secured as formerly, and that the reversion would be thereby proportionably diminished.

The covenant in the draft furnished by the petitioner was in the same words as that in the original lease. In the draft, as altered by the respondent, the covenant stood thus:—"And further, that the said Patrick Waldron, his heirs and assigns, shall and will from time to time, and at all times during the continuance of the estate hereby granted, well and sufficiently repair, amend, preserve and keep the premises, so demised by the said indenture of the 29th of August 1833 as aforesaid, and all houses, buildings, ditches and improvements whatsoever, which at the time of the said last mentioned indenture were, or since have been, or hereafter shall be, made, erected, or built on the said premises, or any part thereof, or in the mears and bounds thereof, in good, sufficient and tenantable repair," &c.

The only question in dispute between the parties, and discussed at the hearing of the petition, was the form of the covenant to keep in repair.

*The Solicitor-General, for the petitioner.*

*Argument.*

Mr. Deasy and Mr. Johns, for the respondent, contended that the words of the covenant in the original lease should be altered to meet the circumstances; that if the covenant was inserted in its original terms, the effect would be to exonerate the tenant from all breaches

of covenant prior to the fee-farm grant. They cited *Flood v. George* (*a*) ; *Kennan v. White* (*b*) ; *Nixon v. Denham* (*c*).

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—  
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*Mr. Cogan*, in reply, cited *Trant v. Dwyer* (*d*) ; *Fitzgerald v. O'Connell* (*e*) ; *Midgley v. Lovelace* (*f*) ; *Platt on Covenant*, p. 138 ; *Furl. Land. and Ten.*, p. 265.

#### The MASTER OF THE ROLLS.

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The original lease in this case bears date the 15th of June 1798. The interest of the lessee is vested in the petitioner, and that of the lessor in the respondent. The facts are not disputed, and a reference to the Master is not necessary. The only question between the petitioner and respondent is as to the form of the covenant to keep the premises in repair, which should be inserted in the fee-farm grant.

A renewal of the lease was executed on the 29th of August 1833. That renewal contains a covenant in these words :—" That the said Patrick Waldron, his heirs and assigns, shall and will from time to time, and at all times during the continuance of this demise, well and sufficiently repair, amend, preserve, and keep the said demised premises and all houses, buildings, hedges, ditches, and improvements whatsoever now made, erected, and built, or which hereafter shall be made, erected, or built, on the said demised premises or any part thereof, and the mears and bounds thereof, in good, sufficient and tenantable repair, order and condition, and at the end, or other sooner determination of this demise (which shall first happen), shall and will peaceably and quietly leave, surrender, yield, quit, and deliver up the quiet and peaceable possession of the same unto the said Charles Fitzgerald, his heirs and assigns, in like good, sufficient and tenantable repair, order and condition." The petitioner seeks to have inserted in the fee-farm grant a covenant in the same terms as that in the renewal of 1833. On the other hand, the respondent contends that the effect of adopting the very terms of that covenant

(*a*) Lyne App. 28.

(*b*) Lyne App. 99.

(*c*) 1 Ir. Law Rep. 100.

(*d*) 1 Dow. & Cl. 125.

(*e*) 6 Ir. Eq. Rep. 455.

(*f*) 2 Carth. 299.

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*Judgment.*

will be to deprive him of his legal remedy, if there has been a breach of covenant since the renewal of 1833. For example, if houses were standing on the demised lands in 1833, which have since been pulled down, the effect of adopting the form of covenant required by the petitioner will be, to exclude all responsibility in respect to those houses, and to deprive the respondent of an existing cause of action.

The respondent contends that the fee-farm grant should leave the parties exactly in the same position as they are now, and accordingly the covenant, as furnished by him, is to "repair, amend, preserve, and keep the premises so demised by the said indenture of the 29th of August 1833 as aforesaid, and all houses, buildings, ditches, and improvements whatsoever, which, at the time of the execution of the said last mentioned indenture, were, or since have been, or hereafter shall be, made, erected, or built on the said premises, or any part thereof, and the mears and bounds thereof in good, sufficient, and tenantable repair, order, and condition." &c.

The effect of that alteration is to leave the parties precisely in the position they are in at this moment under the renewal of 1833. The variation in the terms of the covenant of 1833 has the effect of making the contract the same—the adoption of the same terms to make the contract different. I have, therefore, come to the conclusion, that the respondent is right in requiring the covenant in the altered form. If there has been no breach of covenant by the petitioner, he is not damaged in having the fee-farm grant in the form sought, which leaves the parties in the same position as they are in under the renewal of 1833, just as if the statute had enacted that the lease should become a fee-farm grant, without the execution of any further instrument. The Legislature did not intend to vary the existing rights on one side, or the existing liabilities on the other.

I am, therefore, of opinion that the view taken by the respondent is the correct one. The ordinary course is to direct a reference to the Master to settle the deed. But I apprehend a reference will not be necessary in this case.

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## LURTING v. CONN.

Nov. 29.  
Dec. 2.

THE bill in this cause was filed for an injunction to restrain the defendant from breaking up a rabbit-warren. The facts, as they appeared in the bill, were as follows:—

Thomas Church, being entitled to certain lands under a lease from the see of Derry, on the 29th of July 1835, made a sub-lease thereof to Joseph Conn for eighteen years, from the 1st of November 1834, at a rent of £60. The latter lease contained the usual covenant to repair, but no covenant for renewal; and the following memorandum was indorsed on the lease, and signed by the lessee:—

“Before signing hereof I do hereby, during this demise, grant to the said Thomas Church the number of twenty pair of rabbits' flesh yearly during this demise.” A renewal of the original lease was granted by the Ecclesiastical Commissioners, the interest in which was vested in the plaintiff.

The lands consisted of 309 acres, Cunningham measure, and were situated along the shore close to where Loughfoyle empties itself into the sea. About 190 acres had never been broken up, but were always kept as a rabbit-warren, and consisted of a continuation of small hills and intervening hollows, covered with fog grass on which the rabbits fed. Another portion of 119 acres, distinct from the rabbit-warren, comprised the farm used for cultivation and agricultural purposes. The defendant's father occupied the premises for many years previous to the lease, and well knew the purpose for which they had always been kept. The rent in the lease of 1835 was considerably less than that which had previously been paid, in consequence of the depreciation in the value of rabbit skins. It had been recently discovered, since the potato crop became unsound, that potatoes grown on new land, not previously broken or cultivated, and in a sandy soil, are less susceptible of unsound-

To break up a rabbit-warren, unless it be a warren by charter or prescription, is not waste at Common Law, and the Court will not grant an injunction to prevent it.

*Quare, if the warren be demised as such?*

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ness, and in consequence there was a great competition for land of that description to plant potatoes in, and though the land was poor and the crop small, parties were willing to give £4 an acre for it. The defendant had always hitherto used the rabbit-warren as such, and killed and sold the rabbits; but he lately threatened to sell the rabbit-warren to parties to plant potatoes, and advertised the rabbit-warren to be let out in lots for that purpose, and twenty-seven persons took lots, although cautioned against doing so. The portion of the lands so let never had been, in the memory of man, broken up. When sandy soil is broken up it becomes of no value, and likewise causes injury to the adjoining lands from sand drifts.

Affidavits in support of the statements in the bill were made by three persons, who were acquainted with the lands for thirty-five, forty and fifty years respectively.

The defendant's answer denied that, at the making of the lease, two-thirds of the lands were, or had been, exclusively used as a rabbit-warren, inasmuch as such part only of the said lands as were unfit for any other purpose were so exclusively used. It stated that rabbit-warrens since the peace had become of little value, and since then were let in the usual way as agricultural farms are let, without any stipulation or covenant to keep them up; that Edward Conn in his lifetime, and the defendant since his death, cultivated and used the lands indiscriminately, or in every way which they respectively thought would make them more productive, and did so cultivate them with the knowledge of the plaintiff. The answer denied that the defendant had advertised the warren to be let for potatoes, or that he intended to set it for that purpose, or that any agreement had been entered into to let any part of the warren. The defendant further stated that the nature of the soil proposed to be let by him was a mixture of dark, heavy sand, marl and moss; that none of the lots proposed to be let comprised ground that was used as a rabbit-warren at the time of the execution of the lease, and that long prior to the lease, the greater part, if not the entire, of the rabbit-warren had been broken up and cultivated.

Affidavits were made in support of the answer. The affidavit of Daniel M'Mullen stated that for the last twelve or thirteen years he

had lived with the defendant as a day labourer; that since that time the defendant had broken up and cultivated any and every part of the demised premises, indiscriminately, which he thought most suited for agricultural purposes, or would produce the best crops, and that he broke up the same with the knowledge of the landlord; that the greater part of the land proposed to be let, in January last, appeared to have been long previously broken up and cultivated, and was a damp, heavy mixture of sand, marl and moss, not suited for rabbits to burrow or breed in.

The affidavit of Robert Clyde, who, as well as the last deponent, was a marksman, stated that the defendant did not break up the sand hills called the rabbit-warren, and that more than two-thirds of the lands demised by the late Thomas Church to the defendant were sand hills, and were still kept as a rabbit-warren.

The plaintiff now moved to continue an injunction, which had been obtained until answer, until the hearing of the cause.

*The Solicitor-General and Mr. Norman, for the plaintiff.*

*Mr. Brooke and Mr. J. C. Lowry, for the defendant.*

*Queen's College v. Hallett (a); Lord Grey de Wilton v. Saxon (b); Martin v. Coggan (c); Angenstein v. Hause (d)* were cited.

The MASTER OF THE ROLLS, after stating the facts as they appeared in the bill and answer, said:—

If the case rested merely on the matters of fact in issue between the parties, without regard to the question of law, I should have great difficulty in continuing the injunction, because, if the injunction were continued, I might do irreparable damage to the defendant; whereas, if I do not grant the motion, though I might do an injury to the plaintiff, it is not an irreparable injury, for he could recover damages in an action at law, if his case be sustainable in law and in fact. If the bill was dismissed at the hearing, which it would be, provided the defendant established, in point of fact, the

(a) 14 East, 489.

(b) 6 Ves. 106.

(c) 1 Heg. 120.

(d) 6 Ves. 487.

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defence which he has set up, the Court has no power to direct an issue to ascertain the damages sustained by reason of the injunction. In equity, therefore, the defendant would be without remedy; and if he sued at law, he would be told he had no remedy at law for the injury complained of, as it was sustained in consequence of an order of the Court of Chancery. That is the reason why great caution should be used in cases of this kind in granting injunctions.

This is a case of legal waste, if there was waste at all. The bill is sought to be sustained on the ground that ploughing a rabbit-warren is waste at Common Law; and it is contended that a Court of Equity will grant an injunction, in aid of a Court of Law, where there has been legal waste.

It has been assumed in the argument that ploughing a rabbit-warren is waste. If it be not, the right to an injunction fails. To plough up ancient meadow or ancient pasture is waste at Common Law; and it has been therefore assumed by Counsel that to plough up a rabbit-warren is waste.

On looking into the authorities I find that the law is directly the other way. In *Vin. Abr.* tit. *Waste*, vol. 22, pp. 437, 438, D, I find these passages:—"If an ancient meadow, which has been meadow time out of mind, &c., as Brook-meadow, be converted into arable, it is waste: *H. 8 Jac. B.*; *Tresham and Lambe, per Curiam*. But if meadow be sometimes arable and sometimes meadow, and sometimes pasture, there the ploughing of it is not waste: *H. 8 Jac. B., per Curiam*;" and in the following page (p. 438):—"If a lessee ploughs the land stored with conies, that is not waste, unless it be a warren by charter or prescription: *P. 40 El. B.*, between *Moyle and Moyle*, adjudged *per Curiam*." So also "if a lessee of land destroys the coney burrows in the land, it not being a free warren by charter or prescription, it seems it is not waste: *Tr. 9 Car. B. Rot.*, p. 1746."

The same position is laid down in *Rolle's Abridgment* and the other abridgments of the law: and in *Hargrave's Co. Lit.*, 53, a, note:—"If B, lessee of warren by charter or prescription, ploughs the land, it is waste. *Contra*, if it be only land stored with conies, and not a legal warren: *P. 40, Eliz. C. B., Moyle's case*,

*C. C. note 21, and T. 40 Eliz., n. 11; Vid. Noy., n. 312.* Stopping and digging coney burrows not waste in a warren: *Hal. MSS.*, *See Noy.*, 70."

If a lease was made of a rabbit warren as a rabbit warren, the tenant might, perhaps, be considered as precluded from ploughing or destroying it. Therefore I do not say that there might not be cases in which it would be waste, or treated as waste, to plough up a rabbit warren. But in this case the warren is demised as land. The bill makes no case of the land being arable or pasture land. The case made by the bill is grounded on the assumption, that ploughing a rabbit warren is waste.

The case of *Angerstein v. Hunt* (*a*) was referred to by the *Solicitor-General*. In that case an application was made for an attachment for breach of an injunction against ploughing a rabbit warren. The facts are not stated in the report. It may have been a warren by charter or prescription, or the lease may have demised it as such. There is a statement in the bill from which it may, no doubt, be contended that injury may be occasioned to the plaintiff by ploughing this land, which the Court should interfere to prevent. It is said that the soil being sandy, a drift will be created which will injure the other parts of the lands. Suppose that to be so, and that ploughing up the rabbit warren is not waste, an action in the nature of waste will not lie. The form of action would be case, and then a question might arise whether such an action can be maintained for an injury arising from the exercise of a legal right?

This, therefore, is not a clear case for damages at law, and if it be not, what is the rule of this Court in such a case? In *Stephens v. Keatinge* (*b*) Lord Cottenham says:—"I have, in common with other Judges, of whom Lord Eldon was one, frequently expressed my opinion, that in doubtful cases great care ought to be taken by this Court not to grant an injunction which is at all likely to prove unfounded; because, if it turns out to be unfounded, you are doing an irreparable injury to the party restrained; whereas, by withholding it, you may be permitting some injury, but certainly not an injury at all equal to that which you are doing by improperly

(*a*) 6 Ves. 478.  
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(*b*) 2 Phil. 334.  
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granting it. The rule, however, is confined to cases where there is a serious doubt on the mind of the Judge as to whether the title to the injunction is made out or not; for if the Court sees that there is a clear case for an injunction, it would be absurd to say, go to law and prove that which you have already proved here, before I grant the injunction." I entertain very great doubt that any action at law could be sustained, and I shall therefore make no rule on the motion.



#### HENDRIE *v.* THOMPSON.

Nov. 20, 22.

A petition was filed against the public officer and several Directors of a Joint-Stock Bank, who all resided out of the jurisdiction, for a discovery in aid of a defence to an action at law by the public officer against the plaintiff, and for an injunction to restrain the action. The injunction was refused because the Directors were not parties to the record at law, and an admission by them would not be evidence against the plaintiff at law.

THE petition in this cause was filed against John Thompson, the public officer of the Edinburgh and Glasgow Bank, and against a number of persons who were Directors in the Bank. The respondents all lived out of the jurisdiction of the Court. The petition prayed a discovery from the respondents of certain matters in aid of a defence at law against an action brought by John Thompson alone, as the public officer of the said Bank, against the petitioner, on a bill of exchange, and an injunction to restrain the proceeding at law. The defence at law was want of consideration. Notice of trial in the action at law served was for the 26th of November. The petition was filed on the 16th of the same month.

*The Solicitor-General* and Mr. F. W. Walsh, for the plaintiff, who now moved for an injunction.

Mr. Wall and Mr. Gibbon, for the defendants.

But *Semble*, the residence of the Directors abroad, and the want of power to compel a discovery from them, would be sufficient ground for refusing the injunction.

The exception that members of a Corporation may be parties to a bill of discovery, though they have no personal interest, does not apply to members of Joint-stock Companies who sue and are sued by a public officer.

*The Queen of Portugal v. Glyn (a), Kerr v. Rew (b), Lord Redesdale's Treatise*, p. 493, 34th ed., *Anderson v. Dowling (c)*, *Thorpe v. Hughes (d)*, were cited.

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—  
*Judgment.*

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This is a petition of discovery in aid of a defence to an action at law, brought by John Thompson, the public officer of the Edinburgh and Glasgow Bank. It is to be observed, that the statement is, that John Thompson knows nothing of the matters in question. So far as the discovery is sought against him, there is no reason for filing the petition. There are a great number of other respondents who reside out of the jurisdiction, and whom the petition seeks to interrogate.

Neither the petition nor the notice of this motion ask that the notice of the cause petition, or of this motion, on John Thompson or his solicitor shall be deemed good service of the other respondents. It is perfectly clear that I have no jurisdiction or authority in this case, under the Act of Parliament, to order service on any of the respondents out of jurisdiction, nor have I any jurisdiction to order substitution of service on the authority of *Hobhouse v. Courtney*, and that class of cases. If the Court cannot acquire jurisdiction against the other defendants, independently of John Thompson, I should, if I were to make the order sought, in effect grant an injunction against this bill of exchange ever being proceeded on at all, as John Thompson has no means of compelling the other respondents to appear and answer.

It is not necessary, however, to decide the case on that ground. In *The Queen of Portugal v. Glyn (e)* it was decided that a bill of discovery in aid of a defence at law could not be sustained against a person who is not a party to the record at law, although the bill charges that he is solely interested in the subject of the action. Therefore, where a trustee, or a person whose name is used for the benefit of another, sues at law, you cannot file a bill of discovery

(a) 7 Cl. & Fin. 466.

(b) 5 M. & Cr. 154.

(c) 11 Ir. Eq. Rep. 590.

(d) 3 M. & Cr. 742.

(e) 7 Cl. & Fin. 466.

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against him, joining as defendant in the suit the person beneficially interested in the suit at law. The ground on which it was contended in argument that The Queen of Portugal was properly made a party, appears to have been, that where there is a trust, or something in the nature of it, a Court of Law will allow the admission of the person, for whose benefit the action is brought, to be given in evidence against the nominal party on the record. But Lords Cottenham, Lyndhurst and Brougham, all concurred in acting on the previous decisions, and, among others, the case of *Irving v. Thompson* (*a*), in which the Vice-Chancellor of England fully considered the subject, and decided that it was the settled and established rule of a Court of Equity that persons who are not parties to the record at law cannot be joined as defendants in a bill of discovery. The supposed exception to this rule, viz., that of the lessor of the plaintiff in a case of ejectment, Lord Cottenham states, in *Kerr v. Rew* (*b*), not to be any exception at all; for he had consulted some of the Common Law Judges, who had informed him that a Court of Law always treated the lessor of the plaintiff as a party to the record. The latter part of Lord Cottenham's observations, in *The Queen of Portugal v. Glynn*, are peculiarly applicable to the present case. He says:— “The demurring party might in this case be examined as a witness for the plaintiffs to the bill of discovery, the defendants at law; as may the assured, not a party to the record, for the underwriter, as stated by Lord Abinger in his judgment on this case. The case of the lessor of the plaintiff in ejectment being compelled to answer a bill of discovery, is no authority against the rule; for he is considered in all respects as a party to the record, which the assured is not, and accordingly may be examined as a witness; and therefore, if your Lordships were to sanction the principle upon which the judgment of the Court below has proceeded, a very mischievous innovation would be made in the rules and practice of Courts of Equity as to compelling discovery; and an inquisitorial power would be established, by which persons not parties to any litigation might be compelled, in a contest between others, to discover the secrets of their own affairs, upon an allegation, which could not perhaps be

(*a*) 9 Sim. 23.(*b*) 5 M. & Cr. 164.

denied, that they had some interest in the subject-matter of a litigation between others; and as, if the defendant at law be entitled to the discovery in aid of his defence, the action cannot be permitted to proceed till such discovery be obtained, an easy expedient would be afforded of defeating the enforcement of legal rights by action at law, by filing bills of discovery against persons not parties to the record, and out of the jurisdiction, upon an allegation of their being interested in the subject-matter of the action. Of the possibility of such an abuse the present case furnishes a striking example. The rules of Courts of Equity, as they have hitherto existed, cannot lead to such an abuse."

The ground on which the case was argued before me was the same as that used in the House of Lords in the case of *The Queen of Portugal v. Glyn*. It was contended that the answer of the Directors could be given in evidence in the action at law. I am of opinion that their answer would not be evidence. It was decided by Lord Ellenborough, in *The Mayor of London v. Campbell* (*a*), that an admission by a member of a Corporation could not be given in evidence in an action against the Corporation.

In the case of *Bowles v. Page* (*b*) a question arose as to the effect of notice to a member of a public Company, which was represented by a public officer. Tindal, C. J., adverts to the dictum of Baron Parke, in *Steward v. Dunne* (*c*), and lays down that, in the case of a Company in the nature of a Corporation, the ordinary principle of partnership is not applicable, and that notice of a fact to one is not notice of it to the other. On the same principle the admission of one is not binding on the other. The reason assigned is, that these Companies are fluctuating bodies, and may consist of different persons from those who were the members of them when the notice was given. Tindal, C. J., says:—"We are of opinion that a Joint-stock Banking Company, established under the provisions of the 7 G. 4, c. 46, and 1 & 2 Vict. c. 96, and suing in the name of a public officer, is not to be considered as an ordinary co-partnership, but a *quasi* corporate body, and that such Joint-stock Company is not

(*a*) 1 Camp. 23.

(*b*) 3 Man. Gr. & Sc. 16.

(*c*) 12 M. & W. 664.

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affected by that which may be known to any individual shareholder. The public officer represents a fluctuating body, and sues for the existing body of shareholders, who may be different persons from those who were so at the time when the cause of action accrued. And this opinion is confirmed by what fell from Mr. Baron Parke, in *Steward v. Dunn* (*a*), although it was unnecessary to decide the point in that case. It was pressed upon us in the course of the argument, that, even assuming that to be the law in general, yet as Dixon was a member of the Board of Directors, the Company must be affected by that which was known to him; but, as the case states that he had not, as a Director, any management of, or interference in, the banking accounts, we think that the circumstance of his being a Director makes no difference in this respect." It appears to me, on the authority of that case, that the answer of any of the Directors would not be admissible in evidence in the action at law.

It may, however, be said that that is not exactly the test by which to decide whether or not a bill of discovery will lie, because there are cases in which it has been considered that a bill of discovery will lie, even where the answer would not be evidence, in order to gain information.

Lord Redesdale, in his *Treatise*, 5th ed., p. 223, says:—"There seems to be an exception to the rule in the case of a Corporation. For, as a Corporation can answer no otherwise than under the common seal, and therefore though they answer falsely, there is no remedy against them for perjury, it has been usual, where a discovery of entries in the books of the Corporation, or of any act done by the Corporation, has been necessary, to make their secretary, or book-keeper, or other officer a party; and a demurrer, because the bill showed no claim of interest in the defendant, has been in such cases overruled." In the case of *Glascott v. The Governor and Company of the Copper-miners of England* (*b*), the Vice-Chancellor of England decided that the principle applied to the case of a bill of discovery, and he held that the officers of a Corporation might be made parties to a bill of discovery, although they had no interest. That is the only class of cases that has any application to this case, or on which

(*a*) 12 M. & W. 664.(*b*) 11 Sim. 305.

this application could be sustained. If this be a *quasi* Corporation, as stated in the case in 3 *Man. Gr. & Sc.*, it might be argued that the rule as to Corporations would apply, and that the Directors of this Joint-stock Company might be made respondents on the same principle.

This question was not raised in argument, and I have felt some difficulty upon it. In the case, however, of *Dummer v. The Corporation of Chippenham* (*a*), Lord Eldon, after advertizing to the general rule, that a mere witness is not to be made a party to a suit, and the exception to the rule in cases of arbitrators and attorneys, and in the case of a Corporation, whose officers and servants were made parties, states that he would "be unwilling to go further than the Court has already gone upon the point." In the case of *Le Texier v. The Margravine of Anspach* (*b*), Lord Eldon also adverts to the case of the agents or servants of Corporations being made parties, and to its being an exception to the rule of not making witnesses parties.

In this case the public officer is before the Court, and there is no case to show that the principle laid down by Lord Eldon, and which is applicable to Corporations, because they do not put in an answer on oath, is applicable to a case where the public officer is before the Court, who does put in an answer on oath. I do not feel justified in introducing another exception to the general rule.

Independently of the reasons which I have stated, the motion should be refused. It is made on the eve of the trial at law, and according to the case of *Thorpe v. Hughes* (*c*) that is sufficient ground for refusing it.

For these reasons I am of opinion that the motion should be refused.

(*a*) 14 Ves. 252.

(*b*) 15 Ves. 164.

(*c*) 3 M. & Cr. 742.

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Judgment.

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*Rolls.*

## BAXTER v. COMBE.

Nov. 15, 18.

The Court will not, in the first instance, interfere by injunction to restrain the infringement of a patent, unless there has been long and uninterrupted enjoyment under it, but will direct an action to be brought to try the legal right.

Delay in filing the bill is a ground for refusing the injunction.

Where the patent was obtained in 1846, the alleged infringement of it took place in 1847, and the bill was not filed for more than two years afterwards, the injunction was refused.

An agreement to purchase a license to use a patent will not, in equity, preclude a party from disputing its validity.

THE bill in this cause was filed in November 1849, and amended on the 24th of April 1850, and prayed an injunction against the further infringement of a patent granted to the plaintiff Peter Carmichael in trust for himself and the other plaintiffs, and constructing any machine such as that mentioned in the patent, or any imitation thereof.

The bill stated that there was in use in 1846, for the purpose of heckling and dressing flax, a machine called "The Flat Machine," which was worked partly by machinery, and partly by manual labour, and which was susceptible of improvement by the addition thereto of certain mechanical means, whereby the manual labour theretofore used in the working of the machine could be diminished, and the result rendered more certain. That the plaintiff Peter Carmichael, who was in the employment of the plaintiff Baxter, discovered a certain apparatus adequate for effecting such improvement. That letters patent were obtained by the plaintiff Carmichael, which were enrolled on the 16th of May 1846, and a specification of the invention, enrolled on the 13th of November 1846, describing the nature of the invention and the several parts thereof. That after the grant of the said letters patent, but before the 2nd of January 1847, the defendant James Combe, who had constructed a machine for the same purpose, applied to one of the plaintiffs (Marsden), for a license to use the said machinery.

A correspondence ensued between them, which was set forth in the bill, commencing on the 2nd of January 1847, and ending in November 1847. At first the defendant agreed to the terms proposed by Marsden for a license to use the patent; but afterwards, being advised that his machine did not fall within Carmichael's specification, he declined them. The bill stated that the machine constructed

by the defendant, with some slight, but immaterial, changes, was a colourable imitation of the plaintiff's original invention.

The defendant, by his answer, stated that the "flat machine" being imperfect in many particulars, he invented and applied so many different parts, and made such extensive alterations, that the machine completed by him was of an entirely different construction, and was in fact an original invention, and that he obtained a patent for it, which was enrolled on the 7th of September 1848. The answer also submitted that the plaintiff's patent was void as patenting a principle, and because the specification was vague and uncertain, and stated that the letters and proposals of the defendant were written and made under a misapprehension of the facts and of the defendant's rights. The plaintiff now moved to continue an injunction.

Mr. Brewster and Mr. Maley, for the plaintiff.

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Mr. Napier, Mr. F. Fitzgerald and Mr. Pilkington, for the defendant.

*Bacon v. Jones (a), Muntz v. Grenfell (b), The Electric Telegraph Company v. Nott (c), Cutts v. Curtis (d), Hill v. Thompson (e)*, were cited.

#### The MASTER OF THE ROLLS.

It appears that, previously to 1846, there was a machine called "Robinson's Flat Machine," used for the purpose of dressing and heckling flax. A patent was obtained for Robinson's machine, which has expired. A portion of the process of heckling and cleansing the flax in that machine was performed by machinery, and another part by manual labour. The part of the process which was carried on by manual labour was turning or reversing the holders, and moving these holders along the table, the object of this being to heckle both sides of the flax. The rest of the process was carried out by machinery. It was found, in practice, that the effect of per-

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|---------------------|--------------------|
| (a) 4 M. & Cr. 433. | (b) 7 Jur. 121.    |
| (c) 2 P. Coop. 41.  | (d) 2 P. Coop. 60. |
|                     | (e) 3 Mer. 622.    |

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forming this part of the process, by manual labour, was, that, if the manual labour was carelessly performed, the process was not effectual. It therefore became a great object to discover a mode by which the whole process should be carried out by machinery. One of the plaintiffs (Peter Carmichael) invented, or supposed that he had invented, a mode by which the whole process of heckling and dressing should be carried on by machinery; and having thus, as he considered, invented this new process, he entered into an agreement with the other plaintiffs in April 1846. The object of that agreement was, that they should become partners in that invention. Shortly afterwards, in May 1846, Peter Carmichael, one of the plaintiffs, took out a patent. I pass by, for the present, the correspondence between Marsden, one of the plaintiffs, and the defendant in the interval; but it appears that the defendant James Combe also invented, as he alleges, a machine calculated to carry out the same process—that is, to supply the defect in Robinson's machine, and to have that done by machinery which was previously performed by manual labour. The present bill has been filed, alleging that the defendant has infringed the plaintiff's patent.

I think it quite plain on the authorities that it is impossible legally to patent a *principle*, and therefore it would be impossible—merely because a certain portion of the process carried on by Robinson's flat machine was done by manual labour—for any person, who has invented a mode by which that which was previously done by manual labour might be done by machinery, to prevent any other person from having recourse to machinery for the same purpose, provided his machine was not a copy, or a colourable copy, of the invention of the other parties. You cannot prevent another from saying, "I will also dispense with manual labour; but I will do it by a process which is much better than yours."

This suit, however, has been instituted on the allegation, on the plaintiff's part, that the defendant's machine is a colourable imitation of the plaintiff's invention. I have read the specifications on both sides; both refer to drawings, and I find it impossible to come to a satisfactory conclusion as to whether one is a colourable imitation of the other. But it is plain to me, unless some difficulty arises from the

correspondence in this case, that the case falls within that class of cases in which the Court will not interfere by injunction in the first instance, but will direct an action to be brought. There is no doubt that, where there has been a long and uninterrupted possession of a patent, the Court has, in some instances, interfered summarily. The latest case in which that was done is *Stevens v. Keating* (a), in which case an injunction was granted although there had been no trial at law. But the patent in that case was comparatively of an old date; it was granted in 1833, and the application for the injunction was in 1847. Lord Cottenham points out the exception to the general rule which exists in cases of patents. He says:—"In patent cases, however, a rule steps in which is quite consistent with the general rule to which I have just referred, and indeed is only an instance of the exception which a correct statement of that rule must always include, viz., that long and uninterrupted possession shall be considered such *prima facie* evidence of title as to justify the Court in protecting the patent right by an injunction until its invalidity, if it be invalid, shall have been established by an action at law." It is clear that in this case there is not that long and uninterrupted possession of the patent which brings the case within the exception to the general rule. The dates in this case, and the plaintiff's delay, justify the Court in requiring that an action should be brought.

The plaintiff's patent was enrolled in November 1846. No doubt the correspondence, to which I shall advert just now, took place in the interval between the plaintiff Marsden and the defendant Combe; but the parties were at arms' length so long ago as November 1847. The plaintiff's solicitor wrote a letter in June 1848, threatening proceedings at law. In the same month there was an answer by the defendant, referring to a solicitor, who said he was ready to enter an appearance, and the bill was not filed until the month of November 1849. If there has been an infringement of this patent, the plaintiff might have brought his case before the Court two years ago. I think it clear, therefore, unless there is something in the correspondence between the plaintiff Marsden and

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(a) 2 Phil. 333.

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the defendant Combe, which imposes a duty on me to grant the injunction, that this is not a case of long and uninterrupted possession within the exception to the general rule.

There are two defences set up by the answer—one, that the plaintiff's patent was invalid on three different grounds:—First, that it is not an original invention; secondly, that the specification was imperfect; and, thirdly, that it is an attempt to patent a principle. But the invalidity of the patent is not the only defence set up by the answer. It also states that the defendant never infringed the patent; he says that the mode by which the end was obtained by his machine is totally different from that by which it was obtained by the plaintiff's machine, and that it is impossible to patent a principle. There are many patents which I could refer to, which show that a principle cannot be patented. For example, there are no less than three modes of preserving timber from dry rot, and three patents seeking the same object.

The plaintiff has strongly contended that the correspondence between Marsden and Combe ought to influence the Court either in granting an injunction, or putting the defendant under terms. It is not necessary to go through that correspondence. I may state generally that what was mainly relied on in it is, that in the interval between November 1846, when the patent was enrolled, and November 1847, the defendant had agreed with Marsden to purchase the right to use the plaintiff's patent, and accordingly did use it.

It was contended, on the part of the plaintiff, that the defendant having agreed with the plaintiff to purchase the right to use the patent which the plaintiff had enrolled in November 1846, a sort of estoppel arose, which precluded him from raising the question of the invalidity of the patent, and that he cannot dispute the validity of the patent, of which he has become the equitable assignee.

But the objection of estoppel only applies to one portion of the defence, viz., the invalidity of the patent. It is no answer to the defence that the defendant never infringed the patent. There is, therefore, no foundation for the argument that I ought to grant an injunction on that ground. But, though the defendant were to

be considered as assignee of the patent, I am not prepared to admit that the effect of a license to use the patent would in equity create an estoppel.

That question arose in the case of *Piddings v. Franks* (*a*). In that case, the plaintiff had obtained a patent for his invention for hermetically sealed self-clarifying coffee, and he assigned to the defendant, Swinburne, the sole and exclusive license for the manufacture and sale of the patent. Swinburne made an equitable assignment of all his interest under the deed to the other defendants. The bill, after stating that these defendants had adulterated the coffee and sold it in the plaintiff's packages, prayed an injunction. The answers disputed the validity, and disclaimed the use of the patent. Counsel submitted that, as licensees of the patent, the defendants were estopped from denying its validity, and cited several cases at law to that effect; but Lord Cottenham thought the case so plain, that he did not call on the defendant's Counsel. He said:—"Are the defendants not to be at liberty to say, we have bought the patent and paid for it, but we do not intend to use it; they are mere equitable assignees, and why should they be deprived of this right, which every stranger has, of disputing the validity of the patent? It is no ground for interposition, that at one time they thought of availing themselves of the patent, and have now chosen to abandon it. A party cannot be called upon to admit that which is the very point he disputes. Before the Court exacts any such admission as the plaintiff here seeks, it ought to be clearly satisfied that the case he sets up is made out." I do not see any distinction in principle between that and the present case.

I offer no opinion as to how far the cases at law may be brought to bear. All I say is, that, according to the view taken by Lord Cottenham and Vice-Chancellor Knight Bruce, the circumstance of having used the patent does not prevent the party from saying that it is invalid. I see no ground for putting the party under terms. I have accordingly drawn up the order exactly in conformity with the order of the Vice-Chancellor in that case, as affirmed by Lord Cottenham. It is, that the motion for the injunction shall

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(a) 1 M'N. & Gor. 36.

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stand over, without prejudice to any question in the cause, with liberty to the plaintiffs, or the plaintiff P. Carmichael, to bring such action at law as he or they may be advised, against the defendants, or either of them, with liberty to the parties to apply as they may be advised, and the defendant Combe is to produce the letters, subject to exception. I have framed the order so as to offer no opinion whether they will be admissible in evidence.

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Dec. 20.

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Jan. 14.

## O'BRIEN v. FITZGERALD.

A fund secured by mortgage was by a marriage settlement, made in 1827, transferred to trustees upon trust to permit the husband to receive the interest of the sum, whether it should continue invested and secured as it was then, or should be invested in any other security, for life, and after his decease upon other trusts, with a power to invest the fund in the public funds or real securities so that the same, with the interest, dividends, &c., should continue and be applied to the same uses, trusts and purposes. The mortgage having been paid off and the money vested in £3½ per cent. stock. Held, that the representative of the husband, who died in August, was not entitled to any part of the dividends due in the following October.

clear yearly sum of £200 of the present currency, the same to be paid to her and her assigns by two even and equal half-yearly payments, on every 1st day of May and 1st day of November in each year, the first payment thereof to be made on whichever of said days shall first happen after the death of the said Thomas Francis Comyn, together with a proportionate part thereof, from the last day of payment, to the day of the death of the said Margaret; provided always, and it is hereby declared and agreed by and between the several parties hereto, that it shall and may be lawful to and for the said George Comyn and Charles Whyte Roche, or the survivor of them, or the trustee or trustees for the time being, acting in the execution of the trusts of this deed, by and with the consent, in writing, of the said Thomas Francis Comyn and Margaret Skerrett, or the survivor of them, to call in and receive all or any part of the said sum so secured by the said mortgage, decree and judgment, and to place out and invest the same, or any part thereof, with such consent as aforesaid, in or upon any public funds or real securities, at interest, or in the purchase of lands or tenements, or any interest therein, and so, from time to time, to alter or change, with such consent as aforesaid, the funds or securities upon which the said trust moneys, or any part thereof, shall be invested, which said newly purchased stock, funds, or securities shall be transferred, conveyed, and settled, and be vested in said trustees or trustee, and so, in such manner, as that the same, with the interest, dividends and profits thereof may remain, continue and be applied, upon and to the same uses, trusts, intents and purposes, as the said sum so secured by said mortgage, decree and judgment, and which said lands and tenements or interest therein, when so purchased, and the rents and profits thereof shall continue and be applied to the uses, trusts and purposes as aforesaid, or as near as the same as may be, according to the true intent and meaning of these presents."

The lands, which were subject to the mortgage, were sold in this cause, and the amount found by the Master to be due on foot of the mortgage was invested in £3 $\frac{1}{2}$  per cent. stock to the credit of the cause, and produced a sum of £5735. 10s. 4d. Thomas F. Comyn charged his life interest with an annuity. The annuitant received

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the dividends from time to time, under an order of the Court, until the death of T. F. Comyn, which occurred on the 14th of August 1850, and at that time there was an arrear of the annuity due.

Argument.

Mr. *Sherlock*, for the defendant Margaret Helen Comyn, the widow of Mr. Thomas F. Comyn, moved that the Accountant-General, out of the cash to the credit of this cause, do draw in favour of the said Margaret for the sum of £93. 10s. 2d., being the dividends which accrued due on the 10th of October 1850, upon the sum of £5735. 10s. 4d., £3½ per cent. stock standing in Bank to the credit of this cause, and that the Accountant-General should also draw in favour of the said Margaret for the future dividends on said stock. He contended that she was entitled to the entire of the dividends due on the 10th of October, as there could be no apportionment of stock on the authority of *Pearly v. Smith* (a); *Sherrard v. Sherrard* (b); *Rashleigh v. Master* (c).

Mr. *Rogers*, for the annuitant of Thomas F. Comyn, argued that by the terms of the deed the interest of the mortgage was apportionable, and the money, when realised, was to be held by the trustees or invested upon the same trusts; and therefore though the general rule was, as stated in the note to *Ex parte Smith* (d), that dividends were not apportionable, it had no application to this case, which was to be regulated by the contract of the parties, as contained in the settlement. The annuitant should not be prejudiced by an alteration, in the nature of the security, by the act of the Court. He would have been entitled to the interest if the money was still secured by the mortgage.

Jan. 14.Judgment.

The MASTER OF THE ROLLS, after stating the application, said:—

Margaret H. Comyn claims the dividends under a settlement of the 21st of November 1827, executed on her marriage. Thomas F. Comyn died on the 14th of August 1850, and it is contended on the

(a) 3 Atk. 260.

(c) 3 Br. C. C. 99.

(b) 3 Atk. 502.

(d) 1 Swan. 349.

part of the plaintiff that Margaret Helen Comyn is only entitled to an apportionment of the dividends, from the 14th of August to the 10th of October 1850. The right to the future dividends is not disputed.

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It is admitted that in general there is no apportionment of the dividends of stock. The rule is stated in 1 *Swanst.* p. 349, *note* :— “The rule of law which refuses apportionments of rent in respect of time is applicable to all periodical payments becoming due at fixed intervals, not to sums accruing *de die in diem*; annuities therefore and dividends on money in the funds are not apportionable.” Several authorities are referred to. But it is contended that, by reason of the provisions of the settlement, and the contract then entered into, the general rule is not applicable to this case, and that the dividends are apportionable.—[His Honor read the provisions of the settlement.]

It is contended that, as by the express provision of the deed, the interest on the sum secured by the mortgage was apportionable, when the mortgage was paid off and invested in stock, the trusts being the same, the dividends should also be apportionable. I do not concur in that argument. In the case of *Pearly v. Smith* (a) “a purchaser from a husband of an interest in South Sea annuities during his life, remainder to other persons (which had been originally secured upon a mortgage, but by order of this Court had been transferred to Government securities), insisted that, notwithstanding the husband died before the Christmas half year became due, yet that he was entitled to be paid proportionably, at the rate of £4 per cent. for the time the husband lived, from Midsummer to the day of his death.” Lord Hardwicke said:—“If it had continued a mortgage, the purchaser would have been entitled to the demand he now makes, because there interest accrues every day for forbearance of the principal, though notwithstanding it is usual in mortgages to make it payable half-yearly. But South Sea annuities are by Act of Parliament considered merely as annuities, and therefore the purchaser here is no more entitled to receive the half-year's dividends, which did not become due until after the husband's death, than he

(a) 3 Atk. 260.

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would in the case of a common annuity payable half-yearly, where the annuitant (in whose place he stands) dies before the half-year is completed."

There is another case to the same effect in the same volume of *Atkyn's Reports*—*Sherrard v. Sherrard* (*a*). It was decided in that case that where money is directed to be laid out in lands, and in the meantime invested in Government securities, though a tenant for life dies in the middle of a half-year, it should not be apportioned, but be paid to the reversioner. The Master of the Rolls said:—"The constant usage has been, where money is to be laid out on lands upon any settlement, and in the meantime invested in Government securities, that the entire half-year's dividends should be paid to him in reversion, notwithstanding the tenant for life died in the middle of the half-year, and shall not be apportioned; otherwise indeed in the case of a mortgage."

In the case of *Rashleigh v. Master* (*b*), a fund, which had been secured by a mortgage, was invested in £3½ per cent. stock. A question arose as to apportioning the dividends. The Lord Chancellor said:—"The Court would not apportion dividends; parties consenting to lay out money in stock must abide the consequences."

I have therefore come to the conclusion, that I am bound by the authorities to make the order in the terms of the notice.

(*a*) 3 Atk. 502.

(*b*) 3 Br. C. C. 99.

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JOHN WEIR

v.

GEORGE CHAMLEY and others.

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April 16.  
1851.  
Jan. 24, 28.  
Feb. 1.  
April 16.*

RICHARD WILLIAMSON, Esq., became the purchaser under the decree in this cause, of the lands of Palmerston, in the county of Dublin; and an order of reference having been made to the Master to inquire and report whether a good title could be made to the purchaser, the Master, by his report, dated the 21st of January 1849, found that a good title could be made. To this report exceptions were taken by the purchaser.

The facts of the case were as follows:—

John Chamley the elder died on the 20th of April 1817. He

wife and her assigns should, after his decease, receive a rentcharge, with power of distress, and that three of his daughters should receive rentcharges, with like remedy by distress and entry as provided with respect to the rentcharge to his wife. The testator then bequeathed pecuniary legacies to his children, and left all the residue and remainder of his real, freehold and personal estates, subject to his debts and the aforesaid legacies and annuities, to the trustees. *Held*, that the rentcharges to the daughters were specifically charged on the same lands as the rentcharge to the wife, and had priority over the legacies, which were charged by the residuary clause only.

By the marriage settlement of one of the daughters, one of the rentcharges and part of a legacy were vested in the children of the marriage (some of whom were minors), subject to an exclusive power of appointment in the parents. The minors were defendants in a suit to carry the trusts of the will into execution, in which the Master found, upon the consent of the Counsel and trustee of the minors, that the legacies and rentcharges were in equal priority, and that the finding was in the nature of a compromise, and beneficial to the minors. The report was confirmed by a final decree, and the lands of P., among others, were decreed to be sold to pay the several sums reported, in the first instance subject to the rentcharges to the daughters, and if sufficient was not produced to pay the debts and legacies, then discharged of the said rentcharges; and if the sum arising from such sale should be insufficient to pay the debts, legacies, and value of the rentcharges, and costs, the legatees and devisees of the rentcharges should abate rateably. The lands of P. were sold discharged of the rentcharges. *Held*, allowing exceptions to the Master's report of good title, that the report and decree, being founded on a consent which the Court had no jurisdiction to take, were erroneous, and the title under it was bad.

Pending an appeal from the above decision, which was affirmed, a deed was executed by the father of the minors, appointing the rentcharge to a son, who was adult when the consent was entered into, and was a party to it, and the legacy to him and two of the minors, who had since come of age. The Lord Chancellor having, on the statement that the plaintiff could then show a good title, referred it back to the Master to review his report, who found that a good title could be made by reason of said deed.

*Sembler*, that the appointment having been made on an emergency, and not *bona fide* for the end designed by the donor of the power, was void.

*Held*, that the title was too doubtful to be forced on a purchaser, and the exceptions to the Master's further report of good title were also allowed.

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was, at the time of making his will and of his death, seized of the lands of Belcamp and Rollsfield, and of the lands of Clonshaugh and Lisaroon, under leases for lives renewable for ever. He was also seized of the lands of Palmerston in fee-simple, and was possessed of considerable personal estate; and being so seized and possessed, he made his will, duly attested, bearing date the 31st of December 1816, and thereby ordered and directed all his just debts, funeral expenses and legacies, thereafter mentioned, to be paid by his executors thereafter named. His executors thereafter named were his wife Henrietta Chamley, and his sons Christopher Chamley and George Chamley.

He then devised all his real and freehold estates in Ireland, and all his personal property, save as thereafter mentioned, to Mathias Woodmason, and to his son George Chamley and the survivor, and the heirs, executors and administrators of such survivor, upon the uses and trusts in the will mentioned, viz.:—To the use and intent that his wife Henrietta should, during her natural life, have, hold, occupy, possess and enjoy his dwelling-house, &c., and the whole of his lands of Belcamp and Rollsfield, subject to the yearly rents therein mentioned, freed and discharged from all grants, annuities and other incumbrances; and further, that his said wife and her assigns should, from and after his (the testator's) decease, yearly and every year during her natural life, have and receive out of the remaining part of his said messuages, lands, &c., and all other his real, freehold and personal property and estate (save as thereafter mentioned), one annuity or yearly rentcharge of £500 sterling, lawful money of Ireland, to be paid to her half-yearly, free from all taxes, &c., on every 1st of May and 1st of November.

The will then gave to her a power of distress upon the lands so charged with the annuity. A devise then followed in the words following:—"And to and for the further use, intent and purpose that each of my daughters Harriet Malone, otherwise Chamley, Lucy and Caroline Chamley, their heirs and assigns, shall and may, from and after the decease of my said wife, yearly and every year for ever thereafter respectively, have, hold, receive and take one annuity or yearly rentcharge, or sum of £100 sterling, lawful money

of Ireland, to be paid and payable to each of my said daughters severally, free and clear of and from all taxes, charges and deductions whatsoever, parliamentary or otherwise, by even and equal portions, on every 1st day of May and 1st day of November, the first payment thereof to begin to be made on such of the said days as shall first happen after the death of my wife; and to the further use, intent and purpose, that each of my said daughters, whether under coverture or otherwise, in case of non-payment of said annuity or yearly rentcharge, or any part thereof, may have like remedy by distress and entry as hereinbefore provided with respect to the annuity or yearly rentcharge of £500 given to my said dear wife; and my will is, and I direct that said annuity or yearly rentcharge of £100 sterling shall be paid to each of my said daughters, into the proper hands of each daughter, whether sole or covert, and notwithstanding any present or future coverture, for their and each of their own sole and separate use and disposal, and in exclusion of any husband or husbands with whom they or any of them hath or shall hereafter intermarry, and wherewithal he, they or any of them shall not in anywise intermeddle, neither shall the same be in anywise subject or liable to his, or their, or any of their debts, dominion, control, management, or engagements; but the receipt or receipts of each of my said daughters alone shall be a sufficient receipt and discharge for the same, notwithstanding their coverture or covertures."

The testator then bequeathed to his wife a legacy of £250, and all the furniture and other personal property in his house of Belcamp. He then devised to his son John Chamley and his heirs all his estate and interest in the lands of Lisaroon.

The testator then bequeathed a legacy of £1000 to his son George Chamley, and he bequeathed £3000, part of the mortgage which he had on the estates of his son-in-law Edmond Malone, to his said trustees, on trust, yearly and every year, to pay the interest to the sole and separate use of his daughter Harriet Malone; the principal of the said sum of £3000 to be divided amongst her children, as in the said will directed.

The testator then bequeathed unto each of his daughters, Lucy

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and Caroline Chamley, their heirs and assigns, the sum of £3000, to be paid to each of them, when they attained twenty-one, or days of marriage, provided they should marry with consent, as in the will mentioned.

The testator then left all the residue and remainder of his real, freehold and personal estates and properties, of what nature or kind soever, subject to his debts and the aforesaid legacies and annuities, unto the said Mathias Woodmason and George Chamley, and the survivor of them, and the heirs, executors, and administrators of such survivor, in trust for the use and behoof of his eldest son Christopher Chamley, his heirs, executors, administrators and assigns, as and for his and their own proper estates, goods or chattels for ever. He then nominated his wife Henrietta Chamley, and his sons Christopher and George Chamley, to be his executors.

The testator died in 1817. The plaintiff John Weir married his daughter Caroline Chamley in the year 1821, and a settlement was executed prior to the marriage, bearing date the 7th of August 1821, and made between the plaintiff John Weir of the first part, Caroline Chamley of the second part, William Hanna and William Hassard of the third part, and John Chamley and Robert Johnson of the fourth part, whereby the said Caroline Chamley granted and assigned the said legacy of £3000, and also the said rentcharge of £100 a-year, so bequeathed and devised to her by her said father, to the said William Hanna and William Hassard, upon trust as to £2000 part of said legacy, and as to said rentcharge of £100 a-year after the decease of said John Weir and Caroline Chamley (to whom the interest of the said £2000 and said rentcharge were limited, as in said deed mentioned), for the children of said John Weir and Caroline Chamley, or such one or more of them as John Weir should by deed, attested as therein mentioned, limit and appoint. A power of appointment to such children was then given to the said Caroline in the event of her surviving her husband, and the £2000 and the £100 a-year rentcharge were limited in default of appointment to the children of the marriage. A covenant was contained in the settlement authorising the said trustees to sell the reversion of the said annuity; but no question was raised upon the argument upon that covenant.

The bill in this cause was filed by the said John Weir to carry the trusts of the will of the said John Chamley the elder into execution. A decree was made on the 30th of January 1846, whereby it was, amongst other things, referred to the Master to take an account of the real and personal estate of the said testator, and of his debts, funeral and testamentary expenses, and legacies, and of all charges and incumbrances affecting the real and freehold estates, and the respective priorities thereof.

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The Master made his report under the said decree, and having set forth the will of the testator and the sums due to the legatees, and a debt due to one creditor of the testator, he found, amongst other matters, as follows:—"I find that the said several legacies and annuities, so devised and bequeathed by the said will of the said testator John Chamley, are all in the same priority, and are next charged on the said lands of Palmerston, Belcamp, Rollsfield and Clonshaugh, respectively; and I have made the foregoing several findings upon the evidence laid before me and set forth in the fourth schedule hereunto annexed, and to which I beg leave to refer, and also upon a consent and agreement entered into before me by the Counsel and solicitors concerned for the plaintiff and for the defendants George Chamley, Caroline Mary Weir, Robert Weir, William Hassard, William Hanna, and Harriet Malone respectively, and for John Chamley, a third person, who has filed a charge, &c. And I have especially considered the interest and benefit of the minor defendants, John Weir, Alexander Weir, Edward Malone Weir, Mary Weir, Harriet Weir, Louisa Weir, and Caroline Weir, and have consulted with their Counsel, William Hanna, Esq., who is also one of their trustees, and I find that the above findings are in the nature of a compromise, and beneficial for the said minors, and that, by adopting the said findings, a tedious and expensive investigation of facts and contest as to their rights will be saved, and I have for those reasons adopted the said findings, and submit the same to your Lordship as my report."

The cause was heard on the 30th of June 1847, and a final decree made. By that decree the report of the 24th of May 1847 was confirmed, and it was ordered and decreed that John Dodd,

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assignee of Christopher Chamley, an insolvent debtor, should within three months pay to the plaintiff and to the defendants, respectively, the sums reported due to them respectively, or in default thereof, that the Master should set up and sell the several lands in the pleadings mentioned, and amongst the rest, the said lands of Palmerston, to pay the said several sums so decreed to be paid. And it was further ordered and decreed that the lands of Belcamp, comprised in a certain indenture of the 27th of June 1806, should be set up, subject to a certain annuity of £100 a-year, thereby created. And it was further ordered that, out of the moneys to arise from the sale of the said lands of Belcamp, the arrears of said annuity should be paid to one George Chamley. "And it was further ordered and decreed that the residue of the said lands be, in the first instance, set up for sale, subject to the three several annuities of £100 each, created by the will of the testator John Chamley; and if the sums to arise from the said sale, and the surplus, if any, to arise from the sale of said lands, comprised in the said deed of the 27th of June 1806, if sold subject to the said annuities, shall be insufficient to pay the debts and legacies decreed due, and costs, it is further ordered and decreed that the said Master do set up and sell said premises, discharged of said three annuities, in manner as to said Master shall seem fit. And it is further ordered and decreed that, out of the moneys to arise from such sale, the plaintiff and the said other persons be paid their said demands; and in case it shall be necessary to sell the said premises discharged of said annuities, it is further ordered and decreed that the devisees of the said annuities be paid the same accordingly. And it is further ordered that the remainder, if any, be paid to such person or persons as shall be declared entitled thereto; and if the sums to arise from such sales shall prove insufficient for the payment of the sums decreed due for debts and legacies, and the value of the said annuities and costs, it is further ordered and decreed that, in such case, the said legatees and devisees of the said several annuities shall abate rateably. And it is further ordered that it be referred to the Master to settle such abatement." And then follow directions as to the costs, &c.

The lands of Palmerston, Belcamp and Clonsaugh having been

set up subject to the three annuities of £300 each, devised by the will of the said testator, and the sum bid having been insufficient to pay the debts and legacies of the testator, the said lands were set up discharged of the said three annuities, and Richard Williamson, Esq., became the purchaser of the lands of Palmerston; and the Master having reported that a good title could be made to the said lands, the purchaser took exceptions to the report.

The material questions arose upon the second, third, fourth and fifth exceptions.

It was contended by those exceptions that the Court had not jurisdiction to direct a sale of the lands discharged of the three annuities. That the decree of the 30th of June 1847, directing such sale, discharged of the three annuities, was not binding on the infant defendants, the children of the plaintiff, John Weir and Caroline his wife, who were entitled to one of the said annuities of £100 a-year, after the death of the said John and Caroline Weir, under the settlement of the 7th of August 1821, subject to the power to appoint to one or more of them as in said deed mentioned.

That the said decree and the report upon which it was founded were also erroneous, the report, which was confirmed by the said decree, finding that the legacies and the said three annuities devised by the said will were all in equal priority, and that the legatees and annuitants should abate; and also that the finding in the report was made by way of compromise, upon consent, and without sufficient authority to bind the infant defendants. By the first exception it was insisted that the infant defendants should have had a day to show cause.

The *Attorney-General* and Mr. *Franks*, for the exceptions. *Argument.*

Mr. *Hughes* and Mr. *Hanna*, for the plaintiff.

The following authorities were cited on the question as to whether the decree was binding on the infant defendants:—*Calvert*

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v. *Godfrey* (a); *Hawkins v. Luscombe* (b); *Chambers on Infancy*, p. 798; *Russel v. Russel* (c); *Horton v. Horton* (d); *Doe v. Scott* (e); *Clinton v. Bernard* (f); Stat. 1 W. 4, c. 47; *Hutton v. Mayne* (g); *Wall v. Busby* (h); *Lloyd v. Johnes* (i); *Curtis v. Price* (k); *Price v. Carver* (l); *Clibborn v. Forstall* (m); *Bennett v. Hamil* (n); *Edgeworth v. Edgeworth* (o); *Magawley v. Brady* (p).

On the question of abatement—*Spong v. Spong* (q); *Creed v. Creed* (r); *Joy v. Campbell* (s); *Jones v. Lord Say and Sele* (t); *Jackson v. Hamilton* (u).

The MASTER OF THE ROLLS (after stating the facts as above)

April 16. said:—

Judgment. I am of opinion that the second, third, fourth and fifth exceptions must be allowed.

The infant defendants are entitled under the settlement of August 1821 to one of the three annuities after the death of their father and mother, John Weir and Caroline Weir, subject to the right to appoint to one or more of them contained in the said settlement.

The decree of the 30th of June 1847 directs that the lands should be sold discharged of the three annuities in the event of the sums arising from the sale being insufficient to pay the debts and legacies. There was but one debt of the testator. The lands have been sold discharged of the annuities; and two questions arise—first, whether the Master had authority, upon the consent stated in

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|---|-------------------------|
| (a) 6 Beav. 97.                                 | (b) 2 Swanst. 392.      |
| (c) 1 Mol. 525.                                 | (d) 7 T. R. 652.        |
| (e) 4 Bing. 505.                                | (f) 6 Ir. Eq. Rep. 355. |
| (g) 3 Jo. & Lat. 586; S. C. 9 Ir. Eq. Rep. 343. |                         |
| (h) 1 Br. C. C. 484.                            | (i) 9 Ves. 37.          |
| (k) 12 Ves. 89.                                 | (l) 3 M. & Cr. 157.     |
| (m) 5 Ir. Eq. Rep. 531.                         | (n) 2 Sch. & Lef. 56.   |
| (o) 12 Ir. Eq. Rep. 81.                         | (p) 9 Ir. Eq. Rep. 59.  |
| (q) 3 Bli. N. S. 84.                            | (r) 11 Cl. & Fin. 491.  |
| (s) 1 Sch. & Lef. 328; S. C. 3 Bli. N. S. 111.  |                         |
| (t) 3 Br. P. C. 113; S. C. 1 Eq. Ca. Ab. 383.   |                         |
| (u) 9 Ir. Eq. Rep. 430.                         |                         |

the report, to find that the legacies and the said three annuities, devised by the will of the said John Chamley, were in the same priority,—and whether the Court had jurisdiction to make the decree founded on the said consent and finding, without any regard to the question, whether by the true construction of the will the said three annuities had or had not priority over the legacies? Secondly, assuming that the said finding upon consent, and the decree founded thereon, are not binding on the infants,—are the three annuities and the legacies devised by the said will in equal priority? or are the annuities charged on the lands of Palmerston in priority to the said legacies?—If the consent, and the report and decree founded thereon, are not binding on the infants, and if the three annuities were, by the will of the testator, charged upon the lands of Palmerston in priority to the legacies, the decree confirming the report (which directs that, if the sums to arise from the sale, subject to the annuities, should be insufficient to pay the debts and legacies and costs, then the Master should set up the lands discharged of the annuities) was an erroneous decree, and the title is bad.

The first question to be considered is, whether the consent and the findings in the report, and the decree founded on such consent, were binding on the infants?

In the case of *Calvert v. Godfrey* (a), the purchaser of an estate under a decree of the Court applied to be discharged from the purchase upon the ground that there was no jurisdiction to order the estate to be sold, and also on the ground of certain alleged defects of title.

In that case a trader, who was seized and possessed of certain freehold and personal estate, died in 1832, leaving an infant heir. His estate was insufficient to pay the debts and charges. His partners, however, by deed took upon themselves to pay all the debts, and secured the principal part of his property for his family. A suit was instituted to carry the deed into execution, and the Master found that it would be for the benefit of the infant heir that the real estate should be sold and applied in the manner mentioned in the deed. A decree was made for a sale, and the infant was

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(a) 6 Beav. 106.

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declared a trustee within the 1 *W.* 4, c. 60. It was decided that the sale under the decree could not be enforced ; that the Court had no jurisdiction to order the sale ; that the infant was not a trustee within the Act, and the purchaser was discharged from his purchase.

Lord Langdale, in giving judgment, stated, amongst other matters :—“The Court may order real estates vested in infants to be sold to satisfy the demands of creditors, or to give to *cestuis que trust* the benefit to which they are entitled. But it has no authority to convert the real estate of infants into personalty, or to sell the real estate vested in an infant, upon the notion that the conversion or sale would be beneficial to the infant himself, or to himself and others.” His Lordship in a subsequent part of the judgment states :—“From the authorities which were referred to in the argument it is apparent that, if there be jurisdiction to sell, mere irregularities and errors in the proceedings will not invalidate the sale, or prevent a good title from being made under the decree ; and in this case I have not thought it necessary to consider several alleged errors in the mode of taking the accounts, and calculating the claims on the estate. Such errors, even if proved, would not have availed the petitioner. But if there was no person who had a right to call upon the Court to sell the estate for the satisfaction of a claim, then it is clear that in substance, as well as in word and form, the sale was only ordered on the ground of its being beneficial to the infant to sell ; and I think that this is not within the jurisdiction of the Court. I do not think that this is a case of election, in which the Court, having the duty of electing for the infant, can, as the result of the election, direct the real estate to be sold. It was, I think, justly argued that if an infant, entitled by descent to real estate, could have a case of election raised, by a proposal to do something for his benefit, no case could arise in which means might not be found to give the Court the jurisdiction to sell the estate of an infant.”

In the case of *Russel v. Russel* (a), it was decided that the Court had no authority to dispose of a minor’s real estate, however it may be for the benefit of the minor ; and Sir E. Sugden, in *Daly v.*

(a) 1 Moll. 525.

*Daly (a)*, stated that the Court had no power to sell the inheritance of the minor upon the report of the Master, and that it could only be done by obtaining an Act of Parliament for the purpose.

There appears to be no distinction, in principle, between the case of the sale of the estate of an infant, and the sale of lands discharged of an estate or interest vested in an infant.

If, therefore, upon the true construction of the will of John Chamley, the three annuities were a charge upon the lands of Palmerston in priority to the legacies, the Court, in my opinion, had no jurisdiction to sell those lands discharged of the annuities, to which the infant defendants are entitled, upon the assumption, that the consent on the part of the infants, that the legacies and annuities were in equal priority, was beneficial to them, and that it would be beneficial to the infants to sell discharged of the annuity, in order that the legacy settled upon them should be paid.

The question therefore which secondly arises is, whether the three annuities are by the said will charged upon the lands of Palmerston, in priority to the legacies bequeathed by the said will?

The testator by his will, dated the 31st of December 1816, directed all his just debts, funeral expenses and legacies to be paid by his executors thereafter named. His executors were Henrietta Chamley and George Chamley. He then devised all his real and freehold estates in Ireland, and all his personal property, save as thereafter mentioned, to Mathias Woodmason and the said George Chamley, and their heirs, executors, &c., upon the uses and trusts in the will mentioned.

The introductory words in the will did not charge the debts and legacies on the real estate, the executors not being the devisees of the real estate. The authorities on this subject are collected in *Jarmain on Wills*, vol. 2, pp. 523, 524, 525, 528: *Warren v. Davis (b)*. The trusts upon which the real and personal estates, "save as thereafter mentioned," were devised to the said trustees, were to the use and intent that his (the testator's) wife Henrietta should, during her natural life, hold and enjoy his dwelling-house, and the lands of Belcamp and Rollsfield, discharged from all incumbrances,

(a) 2 Jo. & Lat. 758.

(b) 2 My. & Keen. 49.

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and further, that his said wife and her assigns should from and after his decease, during her natural life, have and receive out of the remaining part of his real, freehold and personal property (save as thereafter mentioned) an annuity or yearly rentcharge of £500; and the will then gives to her a power of distress upon the lands charged with the annuity. It may be observed that the power of distress would have been incident to the devise of the annuity without any express provision in the will: *Rodham v. Berry* (*a*); *Buttrey v. Robinson* (*b*).

It is not necessary to decide what part of the property of the testator was not charged with the annuity of £500 a-year under the words "save as thereafter mentioned," because it is perfectly clear that the lands of Palmerston (which are not expressly devised by the will) were charged with the said annuity, under the terms of the part of the will which I have stated.

The will then proceeds thus:—"And to and for the further use, intent and purpose that each of his (testator's) daughters, Harriet Malone, Lucy and Caroline Chamley, their heirs and assigns, should and might, from and after the decease of his wife, yearly and every year for ever thereafter respectively," have and receive an annuity or rentcharge of £100 each,—and then follows a proviso that each of his daughters, whether under coverture or otherwise, in case of non-payment of said rentcharge, should have "like remedy by distress or entry, as hereinbefore provided with respect to the annuity or yearly rentcharge of £500 a-year given to my said dear wife;" and then follows a direction that the said rentcharge of £100 should be paid to each of his said daughters into their proper hands, for their separate use.

It has been contended on the part of the purchaser that the power of distress given to the daughters gave them a legal rentcharge: *Littleton*, s. 221; *Co. Lit.*, 146, *b*; and on the part of the plaintiff, that the daughters were not entitled to a legal rentcharge: *Horton v. Horton* (*c*); and the plaintiff further insisted that no lands having been mentioned by name in the clause devising the rent-

(*a*) *Watk. on Con. by Coventry*, p. 243, *note a.*

(*b*) *11 Moo. 262.*

(*c*) *7 T. R. 652.*

charge to the daughters, or in the clause giving them power to enter and distrain, no lands were charged therewith by the said clause, but that it was only under the residuary devise in the will, to which I shall hereafter advert, that such three annuities, as also the legacies, were charged.

It does not appear to me to be material to consider whether the rentcharges to the three daughters of the testator were or were not legal rentcharges. I am however of opinion that the same lands, &c., which were charged with the rentcharge of £500 a-year for the testator's widow, were charged with the rentcharge to the daughters. It is perfectly clear that the widow was entitled to enter upon and distrain the lands of Palmerston for the rentcharge of £500 a-year, and that such rentcharge had priority over the legacies, which were charged by the residuary clause in the will. The testator directed that his daughters should have "like remedy by distress or entry as hereinbefore provided with respect to the annuity or yearly rent-charge of £500 a-year given to my said dear wife :" and that direction appears to me to show very clearly that the three rent-charges of £100 a-year each were charged upon the same lands, and in the same priority as the rentcharge of £500 a-year.

The testator, after devising the lands of Lisaroon to John Chamley and his heirs, and having bequeathed certain legacies to his said wife, and to his son George Chamley and to his daughter Harriet Malone, and also legacies of £3000 each to his daughters Lucy and Caroline, and having directed that the Government £5 per cent. stock, or Bank stock, which should stand in his name at the time of his death, should be applied, so far as same should extend, to pay the said legacies of £3000 each, so bequeathed to his daughters Lucy and Caroline, then devised the rest of his property in these words:— "And lastly, I hereby leave, devise and bequeath all the rest, residue and remainder of my real, freehold, and personal estates and properties, of what nature or kind soever, subject to my debts and the aforesaid annuities and legacies, unto the said Mathias Woodmason and George Chamley, and the survivor of them, and the heirs, executors, administrators and assigns of such survivor, in trust for the use and behoof of my eldest son Christopher Chamley,

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his heirs, executors, administrators and assigns, as and for his and their own proper estate or estates, goods or chattels, for ever."

Where a testator has manifested an intention to charge his real estate with the payment of either debts or legacies, the question sometimes arises whether such charge extends to the land specifically devised, as well as the residuary lands, or is confined to the latter? This question arose in the case of *Spong v. Spong* (a), and it was decided that the legacies were not charged upon the lands specifically devised, and that, in construing charges of this nature, specific or residuary devises, though for many purposes governed by a common principle, were to be distinguished. *Sir E. Sugden*, in his recent work on *The Law of Property*, as administered by the House of Lords, p. 422, states the rule thus:—"The rule, as between specific devisees or specific legatees, and pecuniary legatees, is, where no contrary intention is expressed, that the pecuniary legatee cannot resort to property that is specifically disposed of. But, of course, if the testator expresses his intention to prefer the pecuniary legatee to the specific devisee or legatee, or if that intention must be necessarily implied from the context, the Court must give effect to it." *Sir E. Sugden*, after referring to *Spong v. Spong* and some other cases, states:—"The decision (*i. e.* in *Spong v. Spong*), it is apprehended, actually was, that the residuary real estates only were charged with the pecuniary legacies, and that the real estates, separately and specifically given, were not at all charged therewith, consequently there was no question of priority or liability to the charge."

The case of *Creed v. Creed* (b) appears to be strongly applicable to this case. Lord Cottenham, in giving judgment in that case, stated:—"The gift of the annuities is in this form:—I leave and bequeath an annuity or yearly rentcharge of so much for life, charged upon and payable out of all my freehold estates and properties, except Ballinanty; and I do hereby charge and incumber the same therewith, and also empower the annuitant to take all and every remedy for recovery thereof, as in cases of rent-service is usual. The gift of the legacies is in this form; after giving several pecuniary legacies, without reference to any fund for payment, the

(a) 3 Bli. N. S. 84.

(b) 11 Cl. &amp; Fin. 491.

will proceeds thus:—"The said several legacies to be paid by my trustees and executors as soon as conveniently may be after my decease, out of such part of my personal estate aforesaid as may remain after payment of my debts and funeral expenses, and such part of said legacies, as shall or may remain unpaid by the said personal estate, to be raised and applied by my trustees and executors, in such manner as they shall think proper, out of my real and freehold properties, except Ballynatty aforesaid; and I do charge and incumber the same therewith." After some observations on the will his Lordship stated:—"If the gifts of the annuities are to be considered as gifts of specific interests in the real estate, they could not be affected by a general charge of legacies: *Spong v. Spong*. The sale of the land for payment of the legacies ought therefore to have been subject to the annuities, and if sold discharged from them, the proceeds must be subject to the same liability."

In another part of the judgment his Lordship adds:—"It appears that there are but two modes by which the annuities and legacies can be put upon the same footing; first, by considering the annuities as general bequests, and not as specific gifts of interest in the lands; or secondly, by considering the legacies as specific gifts of interest in the lands. As to the first, gifts of annuities were formerly treated as specific. But when Sir J. Jekyl, in *Rogers v. Mellicent*, decided that a direction to lay out money in the purchase of an annuity was only a pecuniary legacy, it was thought impossible to maintain the distinction, and all simple gifts of annuities were held to be pecuniary legacies. Such is the statement of Lord Hardwicke in *Lewin v. Lewin*. This rule, however, has no application to the gift of a rentcharge or annuity issuing out of land, for that is an interest in the land itself, and necessarily specific." His Lordship then referred to the cases of *Long v. Short*, and *Devenhill v. Fletcher*, in support of the latter proposition. At the conclusion of the judgment Lord Cottenham adds:—"General legacies do not become specific, because they are payable out of the proceeds of real estate." And again:—"So the charge of the legacies upon the real estate does not make them specific, although the annuities

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payable and issuing out of them are so." And he adds:—"It appears to me, therefore that the annuities are specific gifts out of the real estate, and that the legacies are not, and consequently that the annuitants are entitled to the preference given to them by the decree of Lord Plunket."

The Master was of opinion in this case that there is no provision in the will charging the three annuities of £100 a-year each on the lands of Palmerston, except the residuary clause. I do not concur in that view. It is perfectly clear, in my opinion, that the rent-charge of £500 a-year to the testator's widow was charged on the lands of Palmerston, although those lands are not mentioned by name; and she is given a power of entry and distress, which, in my opinion, entitled her to distrain upon the said lands of Palmerston, for the recovery of the arrears of her said rentcharge. I think there is no doubt whatever that that annuity was, as Lord Cottenham observes in *Creed v. Creed*, "an interest in the land itself, and necessarily specific." I am of opinion that, under the clause giving to the daughters "the like remedy by distress and entry as herein-before provided with respect to the annuity or yearly rentcharge of £500 given to my said dear wife," they are also to be considered as having gifts of specific interests in the lands charged with the annuity of £500 a-year; and it is clear that the lands of Palmerston were charged with the £500 a-year in priority to the legacies. When the testator therefore devised the rest, residue and remainder of his real freehold and personal estate, such clause necessarily excludes the part of the real estates previously specifically devised; and if the gifts of the annuities to the wife and the three daughters are to be considered as gifts of specific interests in the real estate, they are excluded from the residuary clause, and the residuary clause only charges the legacies on the lands, &c., thereby devised. Whether the residuary devise, which is subject to the testator's debts, and the aforesaid annuities and legacies, had the effect of charging the three annuities on the lands of Belcamp and Rollsfield, in addition to the lands, &c., charged therewith by the previous part of the will, or whether the residuary clause is to be construed, as to the annuities, as only referring to what had been already done by the previous

part of the will, it is not necessary to decide. I am, however, of opinion that the lands of Palmerston were specifically charged with the said three annuities, and that they were not affected by the general charge of legacies in such residuary clause. I am of opinion therefore that the second, third, fourth and fifth exceptions must be allowed.

It is not necessary to consider the first exception, and I shall make no rule upon it.

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The order of this Court having been appealed from, the Lord Chancellor, on the 20th of June 1850, ordered that the order of this Court should be affirmed, with costs; and the Lord Chancellor's order concluded thus:—"And it being stated by the Counsel for the plaintiff that he is now in a condition to show that a good title can be made to the said lands, it is further ordered that it be referred back to William Brooke, Esq., to review his said report."

The Master made his report under that order, which bore date the 14th of December 1850, and he found that "by reason of a certain deed of appointment, bearing date the 6th of June 1850, and made by the plaintiff to the defendants Robert Weir, John Weir, Mary Weir, and Harriet Weir, now adult defendants in this cause, in pursuance of the power vested in him by the indenture of settlement bearing date the 7th of August 1821, in the pleadings mentioned, the grounds of the second exception taken to my former report have been removed, and a good title can now be made to the said purchaser."

The deed of the 6th of June 1850 recited that by indenture bearing date the 7th of August 1821 (being the settlement executed on the marriage of the plaintiff John Weir), and made by and between the said John Weir of the first part, Caroline Chamley, his then intended wife, of the second part, certain trustees of the third part, and certain other parties of the fourth part; the said Caroline Chamley assigned the legacy of £3000, to which she was entitled under her father's will, and the rentcharge of £100 a-year, in said deed mentioned, to the trustees of the third part, upon certain trusts, and amongst others, upon trust, from and after the decease of

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the survivor of them the said John Weir and Caroline Chamley, to the use and behoof of all and every, or such one or more of the children of the said John Weir, on the body of the said Caroline Chamley to be begotten, and for such estate and estates, in such parts and proportions, manner or form, with or without power of revocation, as the said John Weir, at any time or times during his life, by any deed or deeds, writing or writings, under his hand and seal, attested by two or more credible witnesses, should direct, limit and appoint; and in default of such appointment, direction and limitation, and as to such portion or parts of the premises whereof no such direction, limitation or appointment should be made, then in such shares and proportions as the said Caroline Chamley should, at any time or times during her life, and after the death of the said John Weir, by any deed or deeds, writing or writings, or by her last will and testament, direct, limit, and appoint. The said deed of the 6th of June 1850 further recited that the said deed of the 7th of August 1821 contained a proviso, by which it was declared and agreed that all and every such appointment, as should or might from time to time thereafter be made by the said John Weir, or Caroline Chamley, or the survivor, conformable to the powers aforesaid, should be deemed good and sufficient appointments for, and notwithstanding that such appointment or appointments should give the entire of, said sum of £3000, or the entire annuity of £100 a-year, to one or more of the children of the said John Weir and Caroline Chamley, to the exclusion of any one or more of them, in case there should happen to be issue of the said John Weir and Caroline Weir; and the said deed of the 6th of June further recited "that the said marriage took effect, and that there was issue thereof Robert Weir, John Weir, jun., Henry Weir, and Henrietta Weir, and several other younger children, for whom the said John Weir intended to make another provision;" and "that said Robert Weir, John Weir, jun., Henry Weir, and Henrietta Weir, had respectively attained twenty-one;" and witnessed that "the said (plaintiff) John Weir, in pursuance and exercise of the said power and authority, did irrevocably limit and appoint £1000, part of the £3000, to and for the use of his son Robert Weir, his executors, administrators and

assigns, and did in like manner appoint the annuity of £100 a-year, to the use of the said Robert Weir, his heirs and assigns for ever, subject to the life estates of the said John Weir and Caroline Chamley in said sum of £1000, and said annuity." And the said deed further witnessed that the said plaintiff John Weir "did direct, limit and appoint £2000, being the residue of said trust fund of £3000, to the said John Weir, jun., Henry Weir, and Henrietta Weir, share and share alike, and to their several executors, administrators and assigns, subject to the said life estates and interests of the said John Weir and Caroline Weir."

Five exceptions were taken to the report of the 14th of December 1850.

The first exception was, that the Master ought to have found that the ground of the first exception had not been removed, and that a good title could not be made to the said purchaser, inasmuch as the decree of the 30th of June 1847 was erroneous, and not binding as against the infant defendants, and especially because no day to show cause was by said decree given to the said infant defendants.

The second exception was in substance the same as the first, but in more general terms.

The third exception was, that the Master ought to have found that, having regard to the report of the 22nd of May 1847, and the final decree and other proceedings in this cause, the deed of appointment could not be deemed and taken as a valid appointment against the said infant defendants, and that a good title could not be made to the purchaser.

The fourth exception was, that the Master ought to have found, under the circumstances of this case, that the said infant defendants were not bound by the deed of appointment.

The fifth was a general exception, that good title could not be made.

*Mr. Brewster, Mr. Christian and Mr. Franks*, for the exceptions, contended that the appointment was fraudulent and invalid under the circumstances, having been executed for the purpose of making good title to the purchaser against the object of the power

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and the intention of the donor of it. They cited *Creed v. Creed* (a); *M'Queen v. Farquhar* (b); *Green v. Pulsford* (c); *Hamilton v. Kirwan* (d); *Palmer v. Wheeler* (e); *Jackson v. Jackson* (f); *Grove v. Bastard* (g); *Lechambre v. Brasier* (h); *Coster v. Turner* (i); *Sugden's Decisions of the House of Lords*, p. 692; *Townsend v. Warren* (k); *Gittins v. Steele* (l).

The *Solicitor-General*, Mr. *Greene* and Mr. *Hanna*, for the plaintiff, contended that the appointment was valid, having been made for a purpose beneficial to all the objects of it, without fraud, or benefit to the donee, who made the appointment. They relied on *Jackson v. Jackson* (m); *Palmer v. Wheeler* (n); *Davis v. Uphill* (o); *Tucker v. Sanger* (p); *2 Sug. Vendors*, p. 185; *3 Sug. Vendors*, p. 476; *Campbell v. Horne* (q); *Green v. Pulsford* (r); *Hamilton v. Kirwan* (s); *Butcher v. Jackson* (t).

The **MASTER OF THE ROLLS**, after stating the Lord Chancellor's order, the report, and deed of the 6th of June 1850, and the exceptions, said:—

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The Lord Chancellor, by the order of the 20th of June 1850, affirming the order of this Court, allowing the second, third, fourth and fifth exceptions to the report of the Master of the 21st of January 1849, has expressly decided that the Court had not jurisdiction to make the decree of the 30th of June 1847, directing a sale of the lands of Palmerston, discharged of the three annuities of £100

(a) 11 Cl. &amp; Fin. 491.

(b) 11 Ves. 467.

(c) 2 Beav. 70.

(d) 2 Jo. &amp; Lat. 391.

(e) 2 Ball &amp; B. 18.

(f) Dru. 91.

(g) 2 Ph. 619.

(h) 2 Jac. &amp; W. 287.

(i) 1 Russ. &amp; M. 311.

(k) 1 Jo. &amp; Lat. 221, n.

(l) 1 Swanst. 199.

(m) Dru. 91; S. C. 7 Cl. &amp; Fin. 997.

(n) 2 Ball &amp; B. 18.

(o) 1 Swanst. 129.

(p) 13 Pr. 607.

(q) 1 Y. &amp; Col. C. C. 664.

(r) 2 Beav. 70.

(s) 2 Jo. &amp; Lat. 393.

(t) 14 Sim. 444.

a-year each ; that such decree was not binding on the infant defendants, the children of the plaintiff John Weir and Caroline his wife ; that the said decree and report upon which it is founded were also erroneous, the report, which is confirmed by the decree, finding that the legacies and the said three annuities, devised by the said will, are all in equal priority, and that the legatees and annuitants should abate. And the Lord Chancellor's order further decides that the finding in the report was made by way of compromise, and upon consent, and without sufficient authority to bind the infant defendants.

The deed of appointment of the 6th of June 1850 does not set right the error in the decree. The Court had no jurisdiction to decree a sale discharged of the annuities. If the decree itself was not a valid and binding decree at the time when the sale was made to R. Williamson, and if the Court had no jurisdiction to make it, which the order of the Lord Chancellor on the exceptions to the first report establishes, it is difficult to understand how a deed subsequently executed could make the sale regular, or the contract binding. The objection is that, at the time of the sale, no decree was in force which authorised a sale to be then made. The decision of this Court had the effect of entitling the purchaser to be discharged. According to the cases of *Coster v. Turner* (*a*), and *Leekmere v. Brasier* (*b*), where there is error in the decree, the purchaser will be discharged, although the parties are proceeding to rectify the error. In the former case it was alleged that the error had been rectified before the appeal was heard ; but not having been rectified when the case was heard before the Vice-Chancellor, Lord Lyndhurst would not entertain the appeal.

In the present case the deed of appointment was executed long subsequent to the petition of appeal to the Lord Chancellor, but shortly before judgment was given by his Lordship. How far it is consistent with the said authorities to have sent back the case to the Master, under the circumstances of this case, is not for me to decide ; but if the Lord Chancellor's attention had been called to the

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(*a*) 1 Rus. & Myl. 311.

(*b*) 2 Jac. & Wal. 289.

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cases of, *Turner v. Coster* and *Lechmere v. Brasier*, he would possibly not have made the order.

The first question to be considered in this case is, whether, where there has been a sale under a decree erroneous on the face of it, (and the order of the Lord Chancellor of the 20th of June 1850, on the second question, has decided that the decree is erroneous on the face of it, and that the Court had not jurisdiction to direct a sale of the lands discharged of the annuities), the deed of the 6th of June 1850 can by relation make that a valid decree, which at the time it was pronounced was made without jurisdiction, or make that a valid sale, which was not, at the time it was made, authorised by a decree which the Court had any jurisdiction to make? It appears to me that the decree is as erroneous now as it was before the execution of the deed of the 6th of June 1850. The Court had no jurisdiction, at the time of the decree, to order a sale of the lands of Palmerston, discharged of the annuity of £100 a-year; and, at the time of the sale, it appeared on the face of the decree that the Court had no jurisdiction.

The effect of the deed of the 6th of June 1850 (it is said) is to take out of the minor defendants the title which would have enabled them to dispute the validity of the decree; but the decree remains unaltered.

There are, no doubt, cases where there have been sales under a decree, and parties who were not bound by the decree have agreed to join in the conveyance, in which the purchaser has been held to his purchase; but there is no case to be found where a sale has been made under a decree, and the Court had no jurisdiction to make the decree, and the decree is on the face of it erroneous, in which the objection has been held to be removed by the execution of a deed, under a power, which does not correct the errors in the decree, but takes the estate, by relation, out of the parties who would be entitled to object. In the case of *Lechmere v. Brasier* (a) the purchaser of the estates, sold under a decree, was discharged from his purchase, upon error in the decree being shown, though the parties were proceeding to rectify it. Lord Eldon, in giving judg-

(a) 2 Jac. & Wal. 289.

ment, said:—"I will not extend the rule, which the Court has adopted, of compelling a purchaser to take the estate, where title is not made until after the contract, to any case to which it has not been already applied. The rule has in many instances been productive of great hardship, and I feel particularly unwilling to extend it to this case, where, to entitle those simple contract creditors to a sale, they must prove a fact which subjects the purchaser to some hazard, whatever it may be. Let the purchaser therefore be discharged from the purchase."

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The observations of Lord Eldon are very applicable to this case, where the purchaser would be obliged, in order to uphold the purchase, if impeached by the minor defendants, to prove the deed of the 6th of June 1850, a matter which would, at all events, subject the purchaser (as I shall presently show) to much hazard. No such proposition ever was heard, as that a purchaser under a decree would be held to his purchase where, to defend his title, he must prove the execution of a deed of appointment, taking out of the defendants, who would be entitled to object to the decree, that title which they had at the date of the decree.

Assuming, however, that the deed of appointment of the 6th of June 1850 would, if it were a valid appointment, have had the effect of removing the grounds of the exceptions to the Master's first report, the next question which arises is, whether the appointment was valid?

In the case of *Aleyn v. Belchier* (a), which is a leading case on the subject of the undue execution of powers, Lord Keeper Henley said that "no point was better established than that a person having a power must execute it *bona fide* for the end designed, otherwise it is corrupt and void." No doubt that the donee of the power derived a personal advantage in that case from the execution of the power; but the principle decided was, that a person having a power must execute it *bona fide* for the purpose for which it was originally intended. Upon the same principle upon which that case was decided, it has been held in several cases, which have been referred to in the course of the argument, that if a parent, having a power of appointment amongst his children, appoints to one or more of them,

(a) 1 Eden, 132.

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to the exclusion of the others, upon a bargain for his own advantage, equity will relieve against the appointment as a fraud upon the power. In one of these cases—*Palmer v. Wheeler* (*a*)—Lord Manners observed, “that the mode resorted to by the parent was to convert that which was intended as a provision for his children into a source of emolument to himself, and to abuse a discretionary power, which he was bound to exercise according to the just claims and exigencies of his family.”

Although in those cases and in others, which have been referred to, the donee of the power executed it for his own advantage, the principle of the decisions which I have stated is, that a person having a power must execute it *bona fide* for the end designed, otherwise it is considered a fraud upon the power; and accordingly there are cases in which the donee of the power entered into no bargain for his own advantage, and derived no benefit from the execution of the power, and yet it has been considered that the power was not well executed, not having been executed *bona fide*, for the purpose for which it was originally intended.

Thus in the case of *Wheate v. Hall* (*b*), it was held not to have been the intention of the donor to give the power for the purposes for which it was there attempted to be exercised, and the purchaser was released from his contract. Sir William Grant, in giving judgment, said:—“I think it would be attended with ill consequences, to put purchasers upon exercising a very nice and critical judgment, with regard to the purposes for which powers have been created; at the same time I cannot conceive that a Court of Equity will sanction the application of a power to purposes clearly and obviously foreign to those for which it could have been originally intended.”

Sir W. Grant decided that there was an undue exercise of the power, and consequently that a purchaser was not to be compelled to take a title depending upon it.

In the case of *Read v. Shaw* (reported in the *Appendix* to Sir E. Sugden's work on *Powers*) the power was attempted to be exercised, not for the purpose for which it was originally created, but in order to make perfect a former invalid transaction; and the title

(*a*) 2 Ball & B. 30.(*b*) 17 Ves. 86.

having been referred to the Master, he by his report, after referring to the documents, stated his opinion that the transaction was not a due execution of the power to sell, or of the power to exchange, contained in the marriage settlement,—for which reason he found that the plaintiffs could not make a good title to the premises. Exceptions were taken to the report, but they were never argued, and the plaintiffs consented to rescind the contract and to pay the purchaser's costs.

In the case of *Cowgill v. Lord Oxmantown* (a), a bill for a specific performance was filed by the vendor of certain property. Lord Abinger, in giving judgment, said :—“The title to this property is founded on the marriage settlement of Mr. Lyster, who conveyed the lands in question to the plaintiff's father in fee. The plaintiff having come into possession of them, contracted to sell them to the defendant, and it was then discovered that Lyster had no title to convey them absolutely to the plaintiff's father, because he had already vested them upon certain trusts under a settlement, and had given the trustees a power of sale and exchange. In order to remedy this defect of title, the plaintiff has procured the execution of fresh deeds, in order to bring the transaction between his father and Lyster within the terms of the power of exchange; and the question therefore is, whether that has been done by the parties, which places the vendor in the situation of insisting on the specific performance of the agreement, made by the defendant for the purchase of this estate? I have great difficulty in saying that the purchaser is bound to accept such a title. This was not a direct sale or exchange under the settlement, but a proceeding taken upon an emergency, in order to rectify what was imperfectly done before. Whether that was a proper exercise of the power contained in the settlement, is extremely doubtful, and as many nice questions depend on the exercise of powers of this nature, I am much disposed to think that the means which have been taken to make this exchange effectually within the terms of the power are not sufficient for that purpose.”

Lord Abinger then adverted to the fact that the deed contained many inaccurate references and false dates, and upon the whole,

(a) 3 Yo. & Col. 376.

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putting both objections together, his Lordship refused to compel the purchaser to take the title.

The plaintiff's Counsel, considering that the Lord Chief Baron had not given an express decision upon the validity of the execution of the power, asked for permission to prepare new deeds of conveyance, but Lord Abinger refused, and said that the situation of the parties had varied so much during the long interval of time that had elapsed since the contract took place, that even if new deeds were prepared, he should think it inconsistent with justice, under the circumstances of the case, to decree the specific performance of the contract.

In the present case the plaintiff, instead of exercising the discretionary power given to him of appointing portions of the £3000 and of the £100 a-year, according to the intention of the settlement, and the just claims and exigencies of his family, has exercised it upon an emergency, in order to get rid of the objections raised upon the former exceptions, and has, with a view to those objections, appointed only to his adult children, and excluded all his children who are still minors. He has thus, as Lord Manners said, abused a discretionary power, which he was bound to exercise according to the just claims and exigencies of his family.

The only child who appears from the Master's report of the 24th of May 1847 to have been then of age was Robert Weir, and accordingly the entire of the rentcharge is appointed to him, as he was adult at the time of that report, and bound by the consent, and it is obviously on that ground that the £100 a-year was appointed to him. It appears to me that the purchaser ought not, under the circumstances, to be compelled to complete his purchase. If I were to compel him to do so, I should, in contravention of what was laid down by Sir W. Grant, "sanction the application of a power to purposes clearly and obviously foreign to those for which it could have been originally intended."

Upon the whole, I think the two questions in this case raise so serious a doubt upon the title, that I should not be justified in compelling the purchaser to accept it.

The second, third, fourth and fifth exceptions must be allowed. I shall make no rule on the first.

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Dec. 13.

THE original bill in this cause was filed by the plaintiff Andrew Vance, for the specific performance of a covenant for perpetual renewal, contained in a lease of the 29th of April 1811.

At the date of the lease, Thomas Lord Northland was seized for life of the Dungannon estate, with remainder to his eldest son the Hon. Thomas Knox, for life, and remainder to the defendant, his grandson, then Thomas Knox, Esq., and afterwards Earl of Ranfurley, in fee. The tenants for life had the usual powers of leasing for three lives or thirty-one years.

By the lease of the 29th of April 1811, made between Thomas Lord Viscount Northland, the Honourable Thomas Knox and the defendant of the one part, and James Falls and Alexander MacKenzie of the other part, it was witnessed that in consideration of the rents, covenants, provisoies and agreements thereafter reserved and contained, and which, on the part of the lessees, their heirs and assigns, were to be paid, kept and performed, they the said Viscount

the tenants of all the K. estates, at the rate of one-sixteenth part of the corn ground, as toll or mulcture for grinding; reserving out of the demise all royalties to A, his heirs and assigns, with liberty for A, B and C, according to their respective interests, and their heirs and assigns, to enter for the purpose of availing themselves of the royalties at any time during the demise, at the pleasure of A, his heirs and assigns; to hold during three lives, and such lives as should be added in pursuance of a covenant for perpetual renewal thereafter contained. By the *reddendum* clause the rent was reserved as to part of the demised premises to A, B and C, according to their respective interests, their heirs and assigns, and as to the residue of the demised premises, to A, his heirs and assigns. There followed, however, a covenant by the lessees to pay the rent of all the demised premises to A, B and C, according to their respective interests, their heirs and assigns. The lessees also covenanted to grind, toll free, all corn for the household of A, B and C, their heirs and assigns, in such of the mills as A, his heirs and assigns, might send it to; and to grind corn for all the tenants of the K. estates at a charge of one-sixteenth of the grain ground. Then followed a covenant by A, for himself, his heirs and assigns, that all the present tenants of the K. estates were bound, and that all the future tenants should be bound to bring their corn to be ground at that rate at the demised mills, and that in default of the tenants so doing, A, his heirs and assigns, would permit legal proceedings to be taken in their names in order to compel the tenants so to bring their corn to be ground, &c., and would produce the counterpart of their leases for that purpose.

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Northland, the Honourable Thomas Knox and the defendant, and each of them, did, according to their respective estates and interests therein, grant, bargain, set and to farm-let, release and confirm to the said lessees (in their actual possession then being by virtue of a bargain and sale, &c., and by force of the statute for transferring uses into possession) and to their heirs and assigns, all that and those that part of the townlands of Gortmenon and Mullaghana, immediately adjoining the grounds attached to and usually held with the corn-mill of Dungannon, bounded by, &c.; and also all that and those the farms or parcels of ground, with the houses, gardens and appurtenances thereto belonging, situate in the said townland of Gortmenon, theretofore held and occupied by the miller, kilnman and mulcturer, employed in the working and management of the corn-mills and kilns of Dungannon, immediately adjoining part of the aforesaid premises, and bounded by, &c.; and also all that and those the farms, &c., with the houses, &c., thereto belonging, situate in the townland of Tempenroe, theretofore held and occupied by the miller, kilnman and mulcturer, employed in the working and

Next came a covenant for perpetual renewal by *A, for himself, his heirs and assigns;* and finally, covenants by *A, B and C, for themselves, their executors, administrators and assigns, for quiet enjoyment, and for further assurance, such further assurance to contain no covenant or warranty that was not already contained in the lease.* Indorsed upon the lease previously to its execution was a memorandum, that if any of the tenants of the K. estates were not bound by their present leases to grind their corn at the mills, *A, his heirs and assigns, should not be liable to compensate the lessees of the mills if such tenants were not so bound, and neglected to grind their corn at the mills.*

The lands demised were, without the profits arising from the mills, wholly inadequate to meet the amount of rent reserved. *A and B and some of the ceux que vivent* having died, a bill was filed, and a decree for a renewal was pronounced against *C.*

*Held,* that *C* was not bound to enter, in the new lease, into the covenants with respect to the mill duties, contained in the original lease on the part of *A, his heirs and assigns.*

*Held also,* that *C* was bound to enter, in the new lease, into all the covenants into which he had entered by name in the original lease.

*Sembly,* that if the demise by *A, B and C* had not been as well for all future lives to be added to the lease as for the original lives, *C* would not have been bound to renew by the covenant for perpetual renewal on the part of *A, his heirs and assigns.*

*Held also,* that *C* having alleged, in his answer, breach of covenant by the lessees as a defence to the bill for renewal, and having failed in proving it, must pay the costs occasioned by that defence.

A covenant for a renewal is a covenant to grant an estate, and implies the insertion of such covenants as are incidental to the legal estate, having regard to the tenure; and a covenant for a lease contains a contract that it shall be accompanied by the ordinary covenants. The party renewing is bound to give that which those from whom he derives were bound to, and did, give by the original contract.

management of the corn-mill and kiln of Viscount Northland, known by the name of the Killyman mill and kiln, bounded, &c.; and also all that and those the said corn-mills and kiln, with the weirs, dams, mill-races and waters, or use of the waters thereto belonging, or theretofore used and enjoyed with the same, in like manner as Viscount Northland had been theretofore accustomed to use the said waters in the working of the said mills, and the rights, easements and appurtenances to the said mills, kilns, weirs, &c., &c., and every of them belonging, together also with the grist, toll, mulcture or succon and other the mill duties usually paid to Viscount Northland, and which were given by and taken from all and singular the tenants or resident occupiers of the said towns and lands of Gortmenon, Tempenroe and Mullaghana, and also of the several towns and lands of Altavannagh, &c., &c. [here thirty-nine other townlands were specified], at the rate or proportion of the sixteenth part or share of the corn or grain ground, as the toll or mulcture for grinding the same [Here followed various provisions as to altering and re-building the mills, &c., and as to the supply of water, and as to such buildings as might be erected by the lessees]; excepting, however, and reserving out of said grants and demise to Viscount Northland, his heirs and assigns, all mines, minerals, &c., &c., with all royalties whatsoever, with full and free liberty to Viscount Northland, the Honourable Thomas Knox and the defendant, according to their respective estates and interests in the premises, and to their and each of their heirs and assigns who should be entitled to the rent and reversion in the said premises, to enter into the said demised premises, and there search for, dig up, cut down and carry away any of the matters or things so reserved and excepted, at any time during said demise or any renewal thereof, at the will and pleasure of Viscount Northland and his heirs and assigns, &c., and also reserving to Lord Northland, the Honourable Thomas Knox and the defendant, according to their respective estates in the premises, his and their heirs and assigns, full and free right and liberty of hunting, &c., upon the premises at all times during the said demise, and all renewals thereof, trespass free, to hold all and singular the said lands, houses, mills, kilns and other

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premises, with the grist, toll, mulcture, succon or mill duties, and the waters, weirs, &c., with the rights, easements, privileges, hereditaments and appurtenances thereby granted and released or intended so to be (except as before excepted) to them the said lessees, their heirs and assigns, from the 1st of November then last, for and during the natural life and lives of [here three persons were specified] and the survivor of them, and during the lives of such persons as should from time to time for ever thereafter be added to the term thereby granted, in pursuance of a covenant for the perpetual renewal thereof therein contained, they the said lessees, their heirs and assigns, yielding and paying therefor and thereout yearly and every year during the term to Viscount Northland, the Honourable Thomas Knox and the defendant, according to their respective estates and interests in the premises, and the reversion thereof, his and their heirs and assigns, for the said premises therein first demised the clear yearly rent or sum of £6. 16s. 6d. per acre, &c., &c., and also yielding and paying therefor and thereout yearly and every year during the said term unto *Viscount Northland, his heirs and assigns*, for all the other premises included in said demise, the clear yearly rent or sum of £230, &c., &c. Then followed a covenant by the lessees with Viscount Northland, the Honourable Thomas Knox and the defendant, to pay the rent to them according to their respective estates and interests in the premises and the reversion thereof, and their respective heirs and assigns; and to the same persons powers of re-entry and distress were reserved. There were also covenants between the same covenantors and covenantees to supply Eakragh Lake with water, and to keep the premises in repair. Then followed a covenant by the lessees with Viscount Northland, the Honourable Thomas Knox and the defendant, and each of them, their and each of their heirs and assigns, that all grain purchased by the lessees or their agents, on Monday in every week during the term, within one mile and a-half of Dungannon, should be purchased at the public crane of the market in that town during market hours, and not elsewhere, and that they would pay a penalty of ten shillings for every barrel purchased contrary to the effect and meaning of this covenant; and also that they (the lessees) would,

during the term, well and sufficiently grind all the corn and grain belonging to and for the use of the household and establishment of Viscount Northland, the Honourable Thos. Knox and the defendant, their and each of their heirs and assigns, on whichever of the mills on the demised premises *Viscount Northland, his heirs and assigns*, might send the same to be ground, free of all toll, mulcture or other charge whatever for grinding the same, and also should and would well and sufficiently grind all the corn and other grain that should grow, or be used, or expended upon the said several towns and lands of Gortmenon, Tempenroe, Mullaghana, Altavannagh, &c. [here the thirty-nine other townlands were named], for the different tenants and occupiers of the said several lands on such of the mills on the demised premises as they had been accustomed to grind their corn and grain at, and should not ask or oblige such tenants or occupiers of said lands, the occupiers whereof had been accustomed to grind their corn and grain at the Killyman mill, to grind their corn and grain at the Dungannon mill, or such mill as might be erected instead thereof, or *vice versa*, but should grind the corn and grain of such tenant and occupier at such of the said mills, or such other mill or mills as might be erected instead thereof on the premises, as they the said tenants and occupiers respectively might elect and think proper to have their corn and grain ground at; and should and would take and accept of the sixteenth part or share of the grain so ground for the grinding thereof; and also that they (the lessees), their heirs and assigns, should and would do suit and service at the Courts Leet and Courts Baron of the manor of Dungannon, and then pay the usual fee of leet-money or head-silver.

Then came the following covenants:—"And the said *Thomas Viscount Northland doth for himself, his heirs and assigns*, covenant, promise and agree to and with the said [lessees], their heirs and assigns, that the several tenants and resident occupiers of the several towns and lands of Gortmenon, Tempenroe, Mullaghana, Altavannagh, &c. [here the other thirty-nine townlands were named], save and except the tenant or occupier of the premises known by the name of the Dungannon Brewery, for and with respect to the same, and now possessed by Thomas Richard

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Geraghty, now are well, legally and sufficiently bound and obliged; and that the tenants in any lease or leases that may be hereafter made and granted by him the said *Thomas Viscount Northland, his heirs and assigns*, of the said several towns and lands, or any part thereof, shall be well, legally and sufficiently bound and obliged to grind all their corn and other grain which should grow and be used and expended in a ground state upon all or any of the said towns and lands at the mills now erected, or which may hereafter be erected, on the hereby demised premises, or any of them, and none other, and pay a sixteenth part or share of corn or grain ground for grinding the same; and that they shall and will accordingly, from time to time, and at all times hereafter during the term hereby granted, so grind all such corn and grain at the said mills or one of them, and there pay the sixteenth share or part of the said corn or grain as toll or mulcture for grinding the same; and in default thereof, the said *Thomas Viscount Northland, his heirs or assigns*, shall and will at the request of them the said [lessees], their heirs and assigns, if they should be minded and desirous to recompense themselves the injury sustained by such default, by legal proceedings against all or any of the tenants or resident occupiers of said several lands so making default, produce, on the application of the said [lessees], their heirs and assigns, on any trial to be had on the occasion, the counterpart or counterparts of the lease or leases of such tenant or tenants, or any other deed or paper in the custody or power of the said *Lord Viscount Northland, his heirs or assigns*, which may be advised as necessary or useful, for them the said [lessees], their heirs or assigns, on any such trial; or at the request of the said [lessees], their heirs or assigns, take and use all or any such lawful and reasonable act, step or proceeding, or permit them the said [lessees], their heirs and assigns, in the name of the said *Honourable Thomas Viscount Northland, his heirs and assigns*, to take and use all or any such lawful and reasonable act, step or proceeding against the said several tenants and resident occupiers of the said several towns and lands, making default in grinding their grain as aforesaid at some mill or mills on the hereby demised premises, in order to enforce the grinding thereof of all such grain at such

mill or mills, and the payment of the sixteenth part or share of the grain so ground as the toll or mulcture for the grinding thereof, which the Counsel of the said [lessees], their heirs or assigns, may for the purpose advise or direct, or which the said *Thomas Viscount Northland, his heirs or assigns*, should or might be warranted to take in any right or way whatsoever. And further, that upon the death of any of the lives for which said term is granted, he the said *Thomas Viscount Northland, his heirs and assigns*, shall and will, upon the application and at the proper costs and charges in the law of them the said [lessees], their heirs and assigns, and upon receipt or payment therefor of a barley-corn as a fine, and all rent and arrears of rent then due, add and insert within six months from the death of such life to the term of said demise the life of such other person as should for that purpose be named by them the said [lessees], their heirs or assigns; and in like manner, and under and subject to the like terms upon the death of every of said lives, and of such other life and lives as might be added in their room or stead in virtue of these presents, continue at all times for ever hereafter to add thereto a new life or lives, as may from time to time be requisite, so as that they the said [lessees], their heirs and assigns, might thereby have and continue a perpetual and subsisting title in the premises hereby granted and demised."

Then followed a covenant by Viscount Northland, the Honourable Thomas Knox, and the defendant, for them and each of them, their and each of their heirs, executors, administrators and assigns, with the leasees, their heirs and assigns, that they paying the rent and fines, and performing the exceptions, covenants, and provisions thereinbefore contained, should at all times during the term and all such future terms as might be added thereto pursuant to the covenant for renewal therein contained, peaceably use, possess and enjoy all and singular the premises, &c., thereby demised, with the appurtenances, and use and exercise the rights, powers and privileges thereby granted to the leasees, their heirs and assigns, without any lawful let, suit, denial or eviction of them the said Viscount Northland, the Hon. Thomas Knox, and the defendant, or any of them, or any person whatever.

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The last covenant was by Viscount Northland, the Hon. Thomas Knox, and the defendant, for themselves and each of them, their and every of their heirs, executors, administrators and assigns, and all persons deriving under them, to execute such further and other act, &c., and assurance for the better demising, granting and assuring all and singular the premises, with the appurtenances, rights and privileges thereby granted in manner and for the term thereby granted and demised, such as by them the said [lessees], &c., should be reasonably advised or required, so as such further act, deed or assurance should contain in them no further or other warranty or covenant than was therein already contained, and that the person required to do the same should not be compellable to travel from his residence for that purpose.

By a memorandum indorsed upon the lease previously to its execution, it was agreed between all the parties "that if any of the tenants or occupiers of any of the within mentioned townlands are not bound or obliged, by the leases they at present hold by, to grind their corn or other grain at any of the within mentioned mills, in such case the said Thomas Viscount Northland, his heirs and assigns, shall not be answerable or liable to make compensation to the said [lessees], their heirs or assigns, for or in respect of any such tenants or occupiers not being so bound, or neglecting, or declining to grind their corn or grain at any of said mills during the continuance of the leases they now hold by;" and it was also stated that inasmuch as Viscount Northland, the Hon. Thomas Knox, and the defendant, had only an estate *pur autre vie* in the watercourses flowing from Eskragh lake, the intention of the parties was not that any greater estate therein should be conveyed to the lessees.

The interest of James Falls and Alexander Mackenzie, the original lessees under the foregoing lease, devolved by assignment on Andrew Vance, the plaintiff in the original bill.

Viscount Northland and the Hon. Thomas Knox having both died, the remainder to the defendant the Earl of Ranfurley became vested in possession. The demised premises had, however, together with other family estates, been put in settlement subsequently to the execution of the lease of 1811, under which settlement the de-

fendant took only a life estate. John Falls, the last survivor of the *ceux que vivent* in the lease of 1811, having died in 1842, the plaintiff Mr. Vance applied to the Earl of Ranfurley for a renewal. A long negotiation and correspondence took place between their solicitors, the Earl of Ranfurley not refusing to grant a renewal, but objecting to enter into the covenants, that the tenants by the existing leases were bound, and the tenants in future leases should be bound, to grind at the mills, and the plaintiff insisting upon those covenants as the only means by which he could recover the toll, which was the most valuable part of the original demise. The negotiation having been broken off, the original bill in this cause was filed in 1846. It prayed that the plaintiff might be declared entitled to a renewal pursuant to the covenant for perpetual renewal contained in the lease of the 29th of April 1811, according to the true intent and meaning thereof, by granting and assuring to the plaintiff, by a proper assurance, the lands, privileges and other the premises comprised in the lease of 1811, and that if necessary it might be referred to the Master to approve of a proper deed of renewal.

The defendant by his answer insisted that by the true construction of the original lease, the disputed covenants being personal covenants, entered into by Lord Northland alone, were not binding on him, and should not be inserted in the renewal. He admitted that it was intended that the lessees should have a perpetual interest in the lands and toll and mulcture, but denied that it was intended that he should be personally liable, or that any of the tenants should be bound to grind their grain at the mills, except such as were so bound at the time of the execution of the lease, inasmuch as at that time a large portion of the estate was, and had ever since been, demised from year to year, a fact notorious in the neighbourhood, and well known to the lessees. He admitted that the lands alone were inadequate to discharge the rent, but insisted that the lands and water-power were adequate so to do, and that the toll usual in the country being now one-thirty-second part of the corn ground, the rent would be very inadequate if the tenants should be bound to pay one-sixteenth. The answer also stated breaches, on the part of the lessees and their assigns, of the covenants to grind the corn of

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the tenants, and to keep the premises in repair, which he suggested, but did not insist upon as a defence to the plaintiff's suit. The latter defence having failed in evidence, was abandoned at the hearing.

The value of the *lands* demised by the lease was proved by evidence to have been wholly inadequate to meet the rent reserved. Five witnesses were examined by the plaintiff on this subject. The general result of their evidence was, that the value of the lands alone, without taking into account the profits arising from the tolls paid at the mills, was in the year 1811 about £40 per annum. On the other hand, the defendant went into evidence to show that the rent was but little, if at all, above the annual value of the lands, and of the use of the water and water-power demised, and which by his answer he stated was the principal inducement to the lessees to take the premises, inasmuch as it enabled them to fulfil their intention of establishing a distillery, which was their chief object.

It was proved by the plaintiff that during the three years prior to 1811 the mills were in the possession of Viscount Northland, and that he worked and managed them by his own miller. The average profit of the mills during that period was proved by the toll collector to have been from £230 to £240 per annum. The original bill charged that, by agreement between the several parties to the lease of 1811, the amount of rent to be reserved thereon was calculated by the value of the lands added to the average annual amount of the profits of the mills during the three years previous to 1811. Some evidence was given of the existence of such an agreement, which was alleged to have been lost, but there was not any evidence given of its contents beyond the fact that the annual value of the lands added to the average of profits of the mills was equal or nearly so to the rent reserved.

The cause was heard on the 16th of November 1848, when the Lord Chancellor, by his decree, declared that the plaintiff was entitled to a specific execution of the covenant for perpetual renewal contained in the lease of the 29th of April 1811, and accordingly ordered that the defendant should execute a lease of the lands and other hereditaments, together with the tolls, mulcture and succon,

and all other rights granted to the lessees of 1811, for three lives (specified), and such other lives as might be added thereto in pursuance of the covenant for perpetual renewal, with such covenants as the defendant was bound to enter into; and referred it to the Master to approve of the form of the lease, with such covenants as aforesaid, and reserved the consideration of all further directions, and the costs of this suit, until after the Master should have settled such lease.

The plaintiff in the original cause died on the 7th of February 1849, having made his will, whereby he appointed John, Thomas and Andrew Vance his executors, who filed a bill of revivor on the 14th of March 1849, and the cause was revived in the month of September following.

The Master made his report on the 2nd of August 1850, referring to a draft renewal, as settled by him. That draft renewal recited the lease of 1811 *verbatim*, and also recited the bringing of the suit, and the circumstances under which it was commenced, the decree and the revivor, and then contained a demise by the defendant to the plaintiffs, the executors of Andrew Vance, of all the premises (except the watercourses flowing into Eskragh lake, the interest in which had expired), in the same language and with the same exceptions as in the lease of 1811, for three specified lives, and the survivor of them, and the lives of such persons as should thereafter be added to the term, in pursuance of the covenant for perpetual renewal in the original lease of 1811, at, under, with and subject to the payment of the yearly rent, fees and duties reserved and made payable by the last mentioned lease, and to the several exceptions and reservations therein, and thereby expressed and reserved, and the several covenants, clauses, provisions, conditions and agreements therein and in the indorsement thereon contained on behalf of the original lessees, their heirs and assigns, to be respectively kept, done, fulfilled and performed.

To the report the plaintiffs filed thirteen exceptions, which, in substance, objected to the draft renewal, that it should have contained all the covenants on the part of the lessors in the original lease, especially the covenants that the present tenants of the town-

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lands named in the lease were bound, and the future tenants thereof should be bound, to grind their corn and grain at the demised mills, and pay one-sixteenth of the corn and grain so ground for the grinding; and a covenant on the part of the defendant to produce the counterparts of the leases of such tenants; and covenants for renewal, quiet enjoyment and further assurance, and the exceptions required that the defendant should be made liable to all such covenants as run with the reversion, or should enter into all such covenants, to the extent of his estate at least.

**Mr. Christian, Mr. F. Fitzgerald and Mr. Trevor,** for the exceptions.

Argument.

The decree of 1848 having established the liability of the defendant to renew, it follows that he must give to the plaintiffs an interest precisely similar to that which they took under the lease of 1811, with all its appendages. The renewal should therefore contain a repetition of all the covenants in the lease of 1811, at all events to the extent of the defendant's present estate in the premises: *Furnival v. Crewe* (a). If a man contract to sell a fee-simple estate, he must enter into all the covenants incident to such an estate: *Church v. Brown* (b). The principle is the same with regard to a contract for the sale of any estate. The very words "demise" and "grant" imply a power of letting, and carry with them a covenant for title and quiet enjoyment; and a lessor is bound to perform all covenants in law as well as covenants in deed: *Nokes' case* (c); *Holder v. Taylor* (d). The right to the mill duties was really the subject of the demise. The substantial existence of that right was secured by the covenants. The defendant was one of the parties who demised, and although it may be said that he did not join in those covenants, yet it is plain that the Hon. Thomas Knox and the defendant were intended to be included by the word "heirs," for that word and the word "assigns" are frequently throughout the lease used as convertible terms for the owners of the landlord's estate: *Stewart v. Donegal* (e). In the exceptions to the parcels, the covenant to pay

(a) 9 Mod. R. 446; S. C. 3 Atk. 83.

(b) 15 Ves. 263.

(c) 4 Rep. 80, b.

(d) Hob. 12.

(e) 2 Jo. & Lat. 636.

rent, and the covenant by the lessees to grind corn for the household of Lord Northland, the Hon. Thomas Knox, and the defendant, those words cannot be understood in any other sense, and the decree of 1848 has affixed the same meaning upon those words in the covenant for renewal. The plaintiffs are entitled to all the covenants which run with the land ; all the covenants in the lease of 1811 are covenants of that description ; but whether or not that be the case, the jurisdiction of this Court is not fettered, and it will carry out the actual contract between the parties : *Tulk v. Moxhay* (a). The defendant claims the benefit of all the covenants entered into on the part of the lessees ; they are, on the principle of mutuality, entitled to the special covenants on the part of the lessors : *Page v. Broom* (b).

Mr. Greene, Mr. Brewster and Mr. J. C. Lowry, for the defendant.

This was not the case of a lease under a power. The defendant joined in the lease of 1811 merely for the purpose of giving validity to the demise, and no further. To hold him liable to the covenants into which Lord Northland alone entered, would be to make a new contract between the defendant and the lessees. Into those covenants, which were incidental to the demise, viz., covenants for quiet enjoyment and for further assurance, the Honourable Thomas Knox and the defendant have entered. Into the whole chain of covenants relating to the mill duties, Lord Northland alone has entered. The omission of the names of the Honourable Thomas Knox and the defendant in one of those covenants only, and their insertion in the others, might have given room for the argument that the omission was casual ; but their names are absent from all those covenants, and Lord Northland's name alone occurs ; *expressio unius est exclusio alterius*. The words "heirs and assigns" cannot be held to include persons who come in by title paramount : *Duchess of Chandos v. Brownlow* (c). The change in the custom of the country with regard to the portion of corn paid for grinding the whole quantity

(a) 1 Hall & Twells. 105.

(b) 3 Beav. 36.

(c) 2 Ridg. P. C. 345.

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supplied, would render it inequitable to compel the defendant to enter into a covenant that the tenants should still continue to pay at the former rate. This Court, in decreeing a renewal, will take into consideration such an alteration of circumstances : *Boyle v. Olpherts* (a). The fact of the plaintiffs being entitled to a renewal does not draw with it a right to all the covenants in the former lease : *Iggulden v. May* (b).

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*Judgment.*

The LORD CHANCELLOR.

This case comes before the Court on exceptions to the draft renewal settled by the Master, taken on behalf of the plaintiffs, who have filed the bill in this cause for a renewal of the lease ; and the point of the exceptions is, that the draft renewal to be now executed should contain on the part of Lord Ranfurley all the covenants which were contained in the original lease. Those covenants are numerous, and deserve separate consideration ; but before entering into the detail of them, it is necessary, I think, in order to understand the case, to go with some minuteness into all the provisions of this instrument.

It is an instrument executed by the then Lord Northland, the Honourable Thomas Knox (his eldest son) and Thomas Knox, Esq., the present defendant, now the Earl of Ranfurley (grandson of Lord Northland), of the one part, and James Falls and Alexander Mackenzie (the lessees) of the other part. The state of the title to the property was admitted to have been that Lord Northland was only tenant for life, and that the property was vested in remainder in the two other co-lessors, in the one for life, in the other in fee. The particular instrument under which Lord Northland took the life estate was not mentioned in the course of the argument, nor is it stated that the lease was made under a power existing in that instrument. It would appear therefore that the Hon. Thomas Knox, and Lord Ranfurley, joined in the instrument in right of their estates in remainder by way of confirmation of the grant by

(a) 4 Ir. Eq. Rep. 241.

(b) 9 Ves. 325; S. C. 7 East, 237, affirmed 2 Bos. & P. N. R. 449.

Lord Northland. That would be the legal operation and effect of the lease. The lease is of property of a peculiar character, partly of lands, but principally of mills as appurtenant, to which is granted the toll or mulcture of tenants on numerous estates, which appear to have then belonged to the grantors; and I presume that those properties stood in the same predicament as to title with the property demised by the lease itself. The conveying parties first grant certain specified parts of the townlands of Gortmenon, Tempenroe and Mullaghana, &c.—[His Lordship read the parcels in the lease of 1811, the habendum and the exceptions.]—In this grant, as I have said, the three parties of the first part joined, and they agree to grant to the lessees all the premises, in the language which I have described, for lives renewable for ever. Then comes the reddendum “yielding,” &c.—[His Lordship read it.]—Then follow several covenants on the part of the lessees to pay the rent, &c. Then follow the clauses of distress and re-entry, in which powers of distress and re-entry are reserved to the three lessors. Then follow some provisions with regard to water, which it is not material to notice. Then follows a covenant with Lord Northland and the Messrs. Knox respectively, their heirs and assigns, on the part of the lessees, to keep the premises in repair, and so to yield them up at the end or other determination of the demise. Then follows a covenant with the three lessors that the lessees will not purchase grain except in a particular specified manner, and a covenant which is of some importance.—[His Lordship read the covenant to grind the landlord's and tenants' corn, and to do suit at the Courts Leet and Baron.]—Then come the covenants by the lessors, and in the first instance three covenants by Lord Northland alone.—[His Lordship read the covenants, that the tenants should grind at the mills, and pay one-sixteenth part of the grain, and that the tenants in existing leases were bound, and in future leases should be bound, to grind at the mills and produce the leases.]—Then follows the covenant for renewal, which is also entered into by Lord Northland alone. Then covenants by the three grantors for quiet enjoyment and further assurance.—[His Lordship read the covenants and the memorandum indorsed upon the lease.]

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It is plain upon this instrument that whatever may have been the intention of these parties, the covenants are divisible into two classes. One, a set of covenants by Lord Northland alone; the other a set of covenants in which Lord Northland is joined by his son and grandson. The present bill, as I have said, was filed to enforce a renewal of this lease; and the material point which has been argued, and upon which in fact the main question turns is, whether in the events which have happened, the present Lord Ranfurley is bound to enter into covenants the same as those into which Lord Northland entered in the deed of demise? In other words, whether Lord Ranfurley is now bound to covenant that the tenants of the property are well and legally bound by their leases to render the toll or mulcture specified in the lease, and that in all future leases to be made by him, his heirs and assigns, they shall be so bound? It has been contended that Lord Ranfurley, granting a renewal of the interest, is bound to enter into these covenants. Now, the question is not upon the construction of those covenants, or how far, supposing them broken by reason of any thing done by Lord Northland himself, the present Lord Ranfurley would at law or in equity be responsible; nor is there any allegation that there was any mistake made in the form of the covenants which the Court should be called on to reform, and that, in truth, those covenants should have been entered into by all the parties. But it has been broadly contended that, notwithstanding the special distinction apparent on the face of the instrument in these covenants, as I have stated, yet, in making a renewal now, and of course in making renewals hereafter to the end of time, the person making the renewal must enter into all the covenants. That is a very strong proposition, when we consider the character of those covenants, and endeavour to collect, from this not very clear instrument, what may have been the real contract between the parties; for undoubtedly there is some confusion in several of the covenants—some omission which a careful conveyancer would have supplied in relation to the names of the two Messrs. Knox in this conveyance. It is difficult to understand what the meaning was in the exception, by which the mines and minerals are reserved to Lord Northland, his heirs and assigns, and the right of re-entry

is given to the three lessors. It is difficult to understand other parts of the instrument, or to form a distinct opinion why it was so worded. But the question is, whether, upon the whole instrument, there is any thing to warrant the Court in saying that Lord Ranfurley must now enter into those particular covenants? The covenant for further assurance is so explicit, that in no way could the Honourable Thomas Knox or Lord Ranfurley, under that covenant, be bound to have executed a further assurance containing the required covenants, because it contains an express declaration that such further act, deed or assurance shall contain in them no further or other warranty or covenant than was therein contained. No words could be more explicit. Upon an instrument with those words showing upon its face that the parties took care cautiously to confine these particular covenants to Lord Northland himself, I do not apprehend that it can be successfully contended that any further assurance of the demise itself could be insisted on containing those covenants. In no way, therefore, that I can see, can those covenants be binding on Lord Ranfurley, unless the argument addressed to the Court is of sufficient weight to warrant it on the principle that the Messrs. Knox were intended to be included within the words "heirs and assigns." Neither of them could be considered as described by the word "heirs." *Nemo est haeres viventis.* Neither can they be considered as coming within the description of "assigns." It does not appear by this instrument that Lord Northland had power to bind either of these parties. On the contrary, the very frame of the instrument implies that he had not any such power; that they were independent parties, and joined individually in separate capacities. Nor can they be assigns in the legal meaning of that term. They might have been assigns if the lease had been made under a power. That doctrine is settled by *Isherwood v. Oldknow* (a), and other authorities; but I do not find any principle which would warrant me in saying that where two parties join in an instrument such as this, they can be considered as joining in any way but in their separate individual characters. It would be distorting legal language to hold that they can be considered as meant by either "heirs or

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(a) 3 M. & S. 382.

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*Judgment.*

assigns." If that had been so, none of the covenants need have been entered into by them individually. Lord Northland's single covenant would have completed the case. But it is contended that this question was decided at the first hearing, because the covenant to renew was entered into by Lord Northland and his heirs and assigns, and that therefore it must be taken that the Court held the defendant bound to renew as heir or assign. First, the case was never argued. No question was raised as to the right to renewal, and I should require a great deal of argument to convince me that the defendant was bound to renew under that covenant. But he is bound to renew on a different principle. He granted and demised those premises in express terms for the lives named, and for all future lives to be named, and that demise and grant contained an implied obligation enforceable upon the persons so demising to complete this grant, and constituted a full and sufficient contract on their part. Therefore it appears to me that on no construction can it be contended that the defendant is bound to enter into these covenants, which were only binding upon the heirs and assigns of Lord Northland. I do not know how far these covenants could be enforced against the defendant. All that I am called upon to consider is, whether Lord Ranfurley is bound in this renewal to enter into the special covenants entered into by Lord Northland, Lord Ranfurley not being heir or assignee, but being bound to renew in his own individual capacity by force of the language of the demise in which he joined. Suppose the lives had dropped in the lifetime of the three lessors, could it be contended that the renewal should contain those covenants, except on the part of Lord Northland ?

Suppose the Renewable Leasehold Conversion Act had passed in the lifetime of the three lessors, and the lessees had applied for a grant in fee under that Act, could it be contended that the grant should contain those covenants by all the owners of the fee? Would the Court have carried this instrument one jot beyond the terms of it? It appears to me that on all these considerations it is impossible to hold that Lord Ranfurley is bound to enter into these special covenants. I admit that there is ambiguity in this lease. Part of it is not capable of satisfactory explanation ; but I am not on

that account to strain for a construction adverse to the import of the whole instrument, and to bind parties by an obligation which it is plain they never intended to take upon themselves. How far Lord Ranfurley may be bound to produce the tenants' leases, I do not think it necessary to say. The covenant is not on the face of it binding upon him, but perhaps this Court might compel him to produce them. But that question is entirely beside the present one, and independent of the covenants. This is merely a question whether the lessees are entitled to those covenants, and in my judgment they are not. There are other covenants in the lease which I believe are not considered as of much moment. But it appears to me to be a plain proposition that a covenant for renewal is a covenant to grant an estate, and implies the insertion of such covenants as are incidental to the legal estate, having regard to the tenure, and a covenant for a lease contains a contract that it shall be accompanied by the ordinary covenants. The lessee is entitled to them, and the landlord is entitled to them, and so a covenant to grant a renewal, generally speaking, implies a covenant to grant an estate with the same covenants and incidents. The party renewing is bound to give that which those from whom he derives were bound to, and did, give by the original grant. But being of opinion that there is not any obligation on the defendant through Lord Northland, he is, I think, bound to renew with a repetition only of the covenants which he entered into himself.

It may answer well enough to add new lives by means of a new label; but if a renewal be executed, I take it that the landlord is entitled, and the tenant is entitled, to have a legal instrument containing the covenants. It is essential that from time to time a person should be supplied who will come under a legal obligation, and that the parties should not be obliged to look about through long lines of descent or conveyance, for a person having the legal estate. Therefore it appears to me that the plaintiffs are entitled to have the covenants entered into by Lord Ranfurley in the original lease repeated over again in the renewal, if they think it worth their while to have them.

Those exceptions which point to the special covenants entered

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into by Lord Northland must be overruled. The other exceptions must be allowed, and the lease must be settled accordingly. I shall not give the costs of the exceptions on either side, and the plaintiffs are to take back their deposit. As to the general costs of the cause, I must consider that the defendant made a case against the right to renewal, in which he failed, therefore he must pay the costs occasioned by the defence set up by the answer against the right to a renewal. The plaintiffs are to pay the rest of the costs of the suit.

As to the covenant for renewal, my impression is that it is not usually repeated under the direction of the Masters in a renewal lease, where the original covenant is for lives renewable for ever. I shall inquire into the practice in this particular.

[The case was not again mentioned.]

1 *Reg. Lib. Gen.* 145.

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**Court of Delegates.**

GEORGE WEBB DERINZY,  
One of the Executors named in the Will of  
ELIZABETH WHITE TURNER, deceased, *Appellant* ;  
FRANCIS T. TURNER, *Respondent.*\*

June 17.

THIS was an appeal from the sentence of the Judge of the Consistorial Court, whereby he pronounced against the validity of the will of Elizabeth White Turner, deceased, dated the 19th of August 1850, on the ground that the will was not signed at the foot or end, as those terms had been construed by the Courts of Probate in England. The will was written on the first and second pages of a sheet of paper, and terminated with a *testimonium* clause, about two inches from the bottom of the second page, leaving ample room not only for the testatrix, but for the witnesses also, to sign their names on that page. The testatrix and the witnesses, however, signed their names opposite to an attestation clause at the top of the third page, and no part of the will was on the same page with the signatures of the testatrix and the witnesses.

In the cause, when in the Court below, the following matters were admitted by a consent, which was made a rule of Court :—

First—That the deceased being of sound and disposing mind, and of the full age of twenty-one years, subscribed her name on the third page of the will alleged on the 19th of August 1850, in the presence of two witnesses present at the same time, who, in her presence, and in the presence of each other, subscribed their names also on the said third page.

Secondly—That before its execution the said will, as it now

Where a will terminated with a *testimonium* clause about two inches from the foot of the second page of a sheet of paper, leaving ample room for the signatures both of the testatrix and the witnesses, all of whom, however, signed their names opposite to an attestation clause at the top of the third page, upon which no part of the will was written; Held, that the will was properly signed within the meaning of the statute 1 & 2 Vic. c. 26.

Statement.

\* The Delegates were PENNEFATHER, B., PERRIN, J., JACKSON, J., Dr. GAYER and Dr. ANDREWS. There not being at present any regular series of Reports of Ecclesiastical Cases in Ireland, we have been induced, by the great importance of this decision, to incur the anomaly of publishing it amongst *The Irish Chancery Reports.*

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appears, was truly read over to deceased by William Storey, one of the witnesses, and she expressed her approbation thereof.

Thirdly.—That the deceased had lost the sight of one eye, and the sight of the other was impaired ; but that, notwithstanding, at the time of the execution of said will she could see and write in such a manner as is shown by the four last pages of an account-book marked "B," all the figures and words on which are in the handwriting of deceased.

Fourthly.—That Thomas Storey, the drawer of the will, conceived there should be seals for deceased and the witnesses, and also conceived that he would not have room for the attestation clause and signatures and seals of deceased and two witnesses on the second page of the will, and accordingly placed the seals on the third page, and directed the deceased and the witnesses to affix their names opposite the seals on the third page, which they in obedience to him did.

Fifthly.—That the will now alleged is in exactly the same plight and condition as it was when read to deceased, and also as it was when executed by deceased.

The book alluded to in the consent was an account-book in which, on the day of the execution of the will, she had written several entries.

*Dr. Wyly, for the appellant.*

*Argument.*

In this case the Judge of the Court below decided against the will solely in deference to decisions of Sir Herbert Jenner Fust. On examination it will be found that those decisions are not founded on sound views of the statute, neither were they necessitated by any ruling of the Privy Council, as Sir Herbert Jenner Fust seemed to say in some of his decisions. The case which was supposed to have given authority to those singular decisions was *Smee v. Bryer* (a). Now, an examination of the judgment in that case would show that there was no principle laid down ; there was no definition of what was "the foot or end." The facts of that case were

(a) 6 Notes Eccles. Cas. 407, and the Judgment, Appendix, p. xli.

such that the will might very justly have been broken, and yet the present will, and many of those condemned by Sir Herbert Jenner Fust be held valid; for in that case the signature was half way down the fourth page, and after, not only the usual attestation clause, but also an attestation by the two witnesses of an interlineation. Yet in *The Goods of Frederick Hearn, deceased* (a), Sir Herbert Jenner Fust thought that the decision in *Smee v. Bryer* obliged him to hold that a space of an inch, though the signature was on the same page, rendered the will invalid. Latterly he required that some part of the will should be on the same page as the signature, and above it; that is, he read the preposition *at* in the statute as if it were *under*. But the rule was not even with that learned Judge incapable of relaxation; for in *The Goods of Hellings* (b), he allowed a will to probate on the ground of the blindness of the testatrix, which, if executed by a person who had good sight, would have been held invalid. Where is the exception for blindness in the statute, or in the judgment of the Privy Council? This showed that the rule was not founded on common sense. The provision of the statute was introduced to prevent additions after execution, and the old practice, which enabled a testator to execute his will by signing his name at the head of it. The word "end" was used as well as "foot" in the Act; the word "foot" alone occurred in the report of the Property Commissioners, and the word "end" was introduced into the statute in order to give greater latitude; and in this case the *testimonium* clause and the facts admitted show the completeness of the instrument. There is also a decision of Dr. Lushington, in *The Goods of Goldie* (c), directly at variance with Sir Herbert Jenner Fust's decisions, and the earlier decisions of Sir Herbert Jenner Fust were to the same effect.

The following cases were also cited:—*Re Bullock* (d); *Re Carver* (e); *Re Gore* (f); *Re Baker* (g); *Ayres v. Ayres* (h); *Willis v. Lowe* (i).

(a) 7 Notes Eccles. Cas. 266.

(b) 1 Robertson, 754.

(c) 7 Notes Eccles. Cas. 552.

(d) 3 Curtis, 750.

(e) 3 Curtis, 29.

(f) 3 Curtis, 758.

(g) 3 Notes Eccles. Cas. 162.

(h) 5 Notes Eccles. Cas. 375.

(i) 5 Notes Eccles. Cas. 428.

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*Argument.*Dr. *Ball*, for the respondent.

The testatrix in this cause had quite good sight, and sufficient room to have signed on the second page. The case comes therefore within the rule laid down in a series of authorities. That rule requires that at all events the signature shall be on the same side as the conclusion of the will. Any other rule would enable every part of the will to be composed after execution. The testator might sign his name at the top of the third page, and concealing, by turning down the first and second pages, the fact that they were not written upon, he might long afterwards compose and write his will on them. The provision of the statute was to guard not only against the objectionable practice of executing by writing the name at the top, but against the making of the will, or any part of it, after execution. The words are *at* the foot or end. It is observable in the 21st section, in prescribing the modes of executing an attestation, the words are not only *at*, but *opposite*, or *near to*, showing that when the Legislature intended to relax the rule, it used the fitting words. The judgment in *Smee v. Bryer* was not wholly without a principle, for especial stress was laid on the fact that no part of the will was immediately above the signature. Sir Herbert Jenner Fust's decisions have been acquiesced in by the Profession, and not appealed from; and that in itself entitles them to the greatest weight, particularly when their number and importance are considered: *Re Hearn* (a); *Re Hill* (b); *Re Minty* (c); *Re Shadwell* (d); *Re White* (e); *Re Rowe* (f); *Re Curtis* (g); *Re Howell* (h); *Re Cuppage* (i); *Jermyn v. Hervey* (k).

## PENNEFATHER, B.

*Judgment.*

We have given this case our best consideration, and I am happy to say that we have all agreed as to the judgment which should be given. The question arose upon the 9th section of the Wills Act (1 Vic.

(a) 7 Notes Eccles. Cas. 266.

(b) Ibid. 269.

(c) Ibid. 374.

(d) Ibid. 377.

(e) Ibid. 543.

(f) Ibid. 546.

(g) Ibid. 546.

(h) Ibid. 550.

(i) Ibid. 552.

(k) 15 Jurist, 184.

c. 26), and was, whether the signature of the testatrix was to be taken to have been affixed to the instrument in question at the foot or end of it? The statute requires that the signature of the testator should be made in the presence of two or more witnesses, present at the same time, who should attest and subscribe the instrument in the presence of the testator, and that the signature of the testator should be at the foot or end thereof. That the present instrument has been signed by the testatrix, and that it is the true expression of her will, no question has been made; and it comes now to be considered whether this instrument, which appears to have been signed by her in the presence of two witnesses, is to be set aside, because, as it has been argued, no part of the writing of the will is on the same side of the paper with the signature of the testatrix and the attestation? If in any case the signature were at such a distance from the body of the will that the Court would make inference that it was not affixed to the instrument, then it would decide that the instrument was not signed by the testator; but upon an inspection of the instrument in question, it plainly appears to have been signed by the testatrix, and to have been signed with the deliberate intention of executing it in a complete and perfect state. One requisite of the statutable forms has unquestionably been complied with. It has been signed by the testatrix, and we are next to consider whether the other requisite has also been complied with, namely, whether it was so signed at the foot or end thereof?

We apprehend that the statute was introduced mainly to do away with those decisions which had determined that a signature at the commencement of a will was sufficient compliance with the Statute of Frauds; and it therefore directed that the signature should be at the end of the instrument, the words of the statute being "at the foot or end thereof." The meaning of the Legislature was not limited to the word "foot;" but was extended, as it strikes us, by the addition of the word "end."

We are then to look at the instrument in question, and to ascertain whether the signature is at the end of it. Executors were appointed by it; the clause was added, "in witness whereof I have hereunto set my hand this 19th day of August 1850." So that the instrument upon

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the face of it appears to be complete and final, and was not within the mischief of that class of cases which gave effect to inchoate instruments that had not been perfected or completed. On the very next page, I may say almost immediately after, comes the signature of the testatrix. Surely, in common sense, that is at the end of the will; and if the object of the Legislature be considered, and if, in reference to that point, we look at the report of the Commissioners, made previously to the passing of the statute, there is nothing to oppose the common-sense view of the matter, nor can any one say that this signature is not at the end of the will.

That it is to be referred to the instrument, appears manifestly on the face of the document, as well as by being proved by the attestation, the testimony of the witness, and the admission in the case.

It is a signature of the will. We think there is sufficient proximity for that. It is not at the beginning or middle, and where else can it fairly be considered to be a signature but at the end of the will?

But it has been said that cases in England have been decided on this statute which bind this Court, or which, though not actually binding the Court, ought to be regarded as of such authority that the *Court ought not to decide contrary to them*. I think, and all the Court agree on this, that, as regards the decisions of the Privy Council, we ought to be very slow indeed to come to any determination opposed to an adjudication by that tribunal.

I would not say that we are bound by these decisions if they should manifestly appear to be wrong; but we ought not hastily, or without the fullest conviction that they are wrong, to decide against them. It would be a great misfortune that the law in Ireland should be administered in one way, and in England in another; that a statute should receive one construction in London, and a different one in Dublin. The statute in question applies equally to both parts of the Empire, and ought, if possible, to receive the same construction. But how far are the decisions in England to be regarded as authorities applicable to the present case? It appears that after the passing of this Act of Parliament, several cases

came before the Judge of the Prerogative Court in England, Sir Herbert Jenner Fust, and that at first he was disposed to view the statute in the same way that we consider it now ; but that afterwards, in consequence, as he said, of communications from higher quarters, he changed his course upon the subject, and came to a decision which, he said, was to be extracted from the decision made by the Privy Council in the case of *Smee v. Bryer* (a), namely, that to support a signature under the statute it was necessary that a portion of the will should be upon the same side of the paper or page with the signature. That rule, it was said, was to be extracted from the decision in *Smee v. Bryer*, with which we have been so much pressed. It is to be remarked that that exact rule is not to be found in the judgment in that case ; and, as far as we can ascertain the facts, *Smee v. Bryer* was materially different from the present case, not only in respect of the distance of the signature from the instrument, but also in the remarkable circumstance of a special memorandum or clause of attestation of an interlineation on the first page being interposed between the body of the instrument and the general attestation clause and signature. Then after the clause of attestation came the signature of the testator, and in such a way that really, as far as we could collect, it could not be said with certainty, upon an inspection of the document, that the signature was one to the will in question ; and if not a signature to the will, it was not at the foot or end of it. However, after that decision, Sir Herbert Jenner Fust appears to have decided several other cases. They have been commented on with great ability by the learned Advocates who have addressed the Court on either side ; and it has been urged that some of those decisions went such a length as to approach absurdity ; and it was attributed to the learned Judge that those decisions, however strange they might appear, were the legitimate consequence of the rule supposed to be laid down by the Privy Council. In one or two of the cases, which I do not mean to say come within the category I have just mentioned, Sir Herbert Jenner Fust said that the rule of the Privy Council was that which I have just adverted to, namely,

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(a) 6 Notes Eccles. Cas. 407.

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that some part of the writing of the will must be on the same side of the paper under which the signature of the testator was to be affixed; so that the signature should be *quodam modo* under the will, and at the foot of it in that sense. Sir Herbert Jenner Fust has decided several cases upon that principle, supposing the rule to be so; and one of those cases, arising upon the will of a Mr. Shadwell, struck me as very remarkable; and if it were a decision of the Privy Council, we should consider it to come very close to the present case, and might perhaps consider it as exactly in point. But that was a case decided not upon any suit, but upon a mere *ex parte* motion for probate, Sir Herbert Jenner Fust saying that he would not give probate upon the motion, and it might reasonably be taken that the parties interested did not think it worth their while to institute a suit for the purpose of obtaining probate; at least the acquiescence in the decision might be attributable to that cause as well as to any other. The same might be said of other cases which came before the same learned Judge; and we cannot, under the circumstances, attribute a binding effect to those decisions of a very eminent Judge unquestionably, but a Judge, so far as this Court is constituted, standing in an inferior situation; nor can we accept those decisions as expressing the universal feeling of the Profession, in contradiction to what appears to us to be the proper construction to be put upon the statute in question.

We think that the signature of the testatrix is to be considered as affixed to the instrument in question, and, being affixed to it, that upon the words of the statute and plain meaning thereof it must be taken to be affixed to it at the end of the will; and that being the case, probate ought to be granted of the will to the executors named in it, and the decision of the learned Judge of the Consistorial Court in that respect reversed. The question being one arising from the act of the testatrix, and from the state of the instrument, we think that the costs should come out of the estate, but that they should be taxed as between party and party.

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## O'REILLY v. SMYTH.

(Chancery.)

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22.

PREVIOUSLY to the intermarriage of John Edward O'Reilly, of Annagh Abbey, in the county of Cavan, with the plaintiff in this cause, then Janetta Martha Chamberlaine, of the city of Chester,

By an ante-nuptial settlement a sum of £7356, the property of the wife, was vested in trustees upon trust that, in case the husband should within six months, by covenant and by a mortgage of certain hereditaments belonging to him, secure payment to them of £4000, they should pay £4356 to him out of the trust money (£356 out of the sum so paid to be for his own use), and upon trust, as to the residue of the trust money left after payment of the £4356, for the wife for her separate use during the joint lives of husband and wife, and for the survivor of them for life, and after the decease of the survivor, upon certain trusts for the children of the marriage, and if no children, upon trust for the wife absolutely if she should survive the husband, but if she should die in his lifetime, upon trust as she should appoint, and, in default of appointment, upon trust for the husband absolutely. As to the mortgage debt of £4000, it was declared that the trustees should stand possessed thereof, and of the securities for the same, upon trust to pay the interest to the husband for life, and after his decease to the wife for life, and after the decease of the survivor upon the same trusts as to the principal of the mortgage debt as were declared of the residue of the trust money for the benefit of the children of the marriage, and if no children, upon trust for the husband, his executors, administrators and assigns absolutely.

Shortly after the marriage the husband executed a mortgage of Whiteacre for the sum of £4000 to the trustees, who therupon paid over to him the sum of £4356.

By his will the husband gave to certain other trustees all his property, real and personal, upon trust to hold the lands of Whiteacre and Blackacre, *first to fulfil the trusts of his settlement*, then for his nephew S. for life, and after his death to his children as he should appoint, remainder over. Several of those remainders over were to females "as *femes soles*." The testator, after bequeathing certain stock to his sister M. and her children, proceeded thus:—"I wish to alter a portion of that part of my will above relating to the funded property bequeathed for M. or her family; should my wife have a child by me, they are to pay S. £500 out of it; should such child or children survive me, my heirs, though life-tenants, may cut, sell and carry away turf off said lands, and cut timber as well off the demesne of Whiteacre as in the charetyard therein." There was also the following clause:—"I give to my beloved wife all our furniture, horses and moveables at Chester, as well as all her own fortune not included in our marriage settlement for her sole use as a *feme sole* should she marry again."

The testator having died without issue—

*Held*, that by the devise of Whiteacre and Blackacre upon trust to fulfil the trusts of the settlement the testatoronerated both those estates with the mortgage debt, but that he did not devise them upon the same limitations as were contained, in regard to the mortgage debt, in the settlement; and accordingly that neither the wife of the testator took, nor would the children of the marriage, if there had been any, have taken, any estate or interest in those lands under that devise, save as securities for the mortgage debt, but were excluded in favour of S. and the other devisees over.

*Held also*, that the ultimate absolute interest of the testator in the £4000 mortgage debt passed to the wife under the bequest to her of all her own fortune not included in the marriage settlement.

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an indenture of marriage settlement, bearing date on the 24th of May 1847, was executed. By that settlement, reciting the intended marriage, and that the plaintiff was absolutely entitled to a sum of £7364. 16s., that sum was vested in trustees upon trust that in case the intended husband should within six months, from the date of the settlement, secure, to the satisfaction of the trustees as well by his covenant as by a mortgage of certain hereditaments belonging to him, payment to them of the sum of £4000, with interest at £5 per cent., then they should pay to him out of the trust money a sum of £4356. 5s. for his own use and benefit, the additional sum of £356. 5s. over and above the sum to be secured by the mortgage being an absolute gift to him; and upon further trust that the trustees should, after deducting that sum of £4356. 5s., invest the residue of the trust money in the funds, &c., and stand possessed thereof upon trust to pay the dividends, during the joint lives of the husband and wife, to the wife for her sole and separate use, independently of the husband, and without power of anticipation; and after the death of either of them, upon trust to pay the dividends, &c., to the survivor for life, and after the decease of the survivor, in trust, as to the principal of the residue, for the child or children of the marriage in manner following, viz., if but one child, in trust for that child, and to be vested in and paid to such child as the husband and wife or the survivor should by deed appoint, and in default of appointment, to be vested in and paid to such child, if a son, at twenty-one, if a daughter, at twenty-one or marriage; but in case there should be two or more children, in trust for them as the husband and wife by deed, or the survivor by deed or will, should appoint, the wife, if the survivor, to have such power of appointment, whether she should be covert or sole; and in default of appointment, in trust in equal shares for such of the children as being sons attained twenty-one, or being daughters attained that age, or married. Then followed clauses for maintenance, education, accumulation, and advancement. But in case there should not be any child, or in case there should not be any child which should live to attain a vested interest in the residue, then that the trustees should stand possessed thereof in trust for the wife, her executors, adminis-

trators and assigns, if she should survive the husband, but if she died in his lifetime, then upon such trusts as she should by deed or will appoint, and in default of appointment, in trust for the husband, his executors, administrators and assigns absolutely. Then followed a power for the trustees, notwithstanding the foregoing trusts, to raise and apply any sum not exceeding £1000 in such manner as the wife should in writing direct.

And it was also by that settlement declared that in case the husband should execute the mortgage for £4000, then the trustees should stand possessed of the mortgage debt, and the securities for the same, upon trust at the request of the husband during his life, and after his decease at the request of the wife, and after the decease of the survivor of them at the discretion of the trustees, to call in the £4000 and invest it in the funds, &c., in their own names ; and upon further trust to pay the interest and dividends of the mortgage debt, or of the stock arising therefrom, to the husband, or suffer him to retain the same during his life, and after his decease to the wife during her life ; and after the decease of the survivor of them, to stand possessed of the principal upon such trusts for the benefit of the children of the marriage, and with such powers of appointment, maintenance and education, and other clauses and provisions as were thereinbefore expressed, declared and contained of and concerning the residue of the £7364. 16s.; but in case there should be no child of the marriage, or in case there should be any child, and no such child should live to attain a vested interest, then that the trustees should stand possessed of the mortgage debt, or the stock arising therefrom, upon trust for the husband, his executors, administrators and assigns absolutely.

Shortly after the execution of the settlement the marriage was duly solemnized ; there, however, was never any issue thereof.

By indenture of the 5th of June 1847, John Edward O'Reilly granted to the trustees the lands of Annagh and Kilnaleck by way of mortgage, in consideration of the sum of £4000 ; and the trustees accordingly paid to him the sum of £4356. 5s. pursuant to the trusts of the settlement.

On the 7th of March 1848, John Edward O'Reilly made his will.

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(which was in his own handwriting) in the words following :—" I give unto, &c. [certain trustees different from the trustees of the marriage settlement], all my property real and personal, upon trust to hold the lands of Annagh, Kilnaleck, Corcanidores, Drumanybeg and Dromheely, with North Kildallon and the Castle of Cavan, first, to fulfil the trusts of my settlement, then for my nephew, C. J. Smyth, A.M., and Barrister-at-law, for his life, and after his death to his child or children as he shall appoint, should he die without issue, thence to the sole use of my sister Margaret for her life, and to her children as she shall appoint, in default of such appointment by her, to her children share and share alike as tenants in common for their lives, her daughters to hold as *femes soles*, notwithstanding coverture, and at demise of said children of said Margaret, to my right heirs, if women, as *femes soles*; my trustees and their heirs continually first paying all rents and fines on said lands.

" As to my funded property, my trustees are to hold £500, £3½ per cent. stock, for the sole and absolute use of Isabella Cusack [the testator's sister], and to pay it only on her sole and separate receipt, notwithstanding her marriage; the remainder of said stock I bequeath for the sole and separate use of said Margaret Reilly; her husband or his creditors to have no interference therewith whatever; if she do not survive me, then for the use of her children in equal proportions, their executors, administrators or assigns, the women to hold as *feme soles*.

" I also bequeath to my said trustees Ennismuck Island for the sole and separate use of said Margaret Reilly. I charge my said lands and each of them with an annuity of £12 a-year for the life and for the sole use of Mrs. Mary Sheridan, otherwise Flood.

" I leave to my said trustees my charge on Pollybawn for to pay to Mrs. Cusack the interest due, or to accrue on it, for her life, and the principal at her death, to such descendants or descendant of my father as she may will it, she receiving said interest as a *feme sole*; in default of such appointment, to my right heirs.

" I wish to alter a portion of that part of my will above relating to the funded property bequeathed for Margaret or her family; should

my wife have a child by me, they are to pay C. J. Smyth, Esq., £500 sterling out of it; should such child or children survive me, my heirs, though life-tenants, can cut, sell and carry away turf-bog off said lands, and cut timber as well off the demesne of Annagh as in the churchyard therein.

"I leave John M. Tronson my gold watch and £10; to each of his sisters £30 sterling, and to his father £24 sterling, to said John M. Tronson all my books, and commend this worthy family to my heirs.

"I give to my beloved wife all our furniture, horses and moveables at Chester, as well as all her own fortune not included in our marriage settlement for her sole use as a *feme sole* should she marry again.

"I direct my furniture at Annagh shall be sold, the carriage we travelled in from London (with the exception of the pictures and engravings, which I leave to my wife), and the produce handed to my three cousins Tronsons in equal shares (save only the best bed, bedstead and bed-clothes, with all the kitchen furniture, which I leave to Mrs. Sheridan, otherwise Flood aforesaid). The £100 above left to the Tronsons to be paid from arrears due to me. I appoint C. J. Smyth, Esq., aforesaid, executor of this will and residuary legatee."

John Edward O'Reilly died on the 3rd of September 1848, without revoking or altering the above will, and without issue, leaving his sisters Margaret O'Reilly and Isabella Cusack, and his nephew C. J. Smyth (the eldest son of a deceased sister of the testator), his co-heirs at law, him surviving.

On the 17th of January 1850, the testator's widow, Janetta Martha O'Reilly, filed a bill in this Court, praying that the will of the testator might be established, and the trusts thereof carried into execution, and that she might be declared absolutely entitled for her separate use to all principal and interest due on the mortgage of the 5th of June 1847, and to an estate for her own life in the mortgaged hereditaments (Annagh and Kilnaleck), and in the lands of Corcandidoe, &c., &c., and the Castle of Cavan, subject to the annuity to Mary Sheridan, and to such charges paramount to the will as the

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personal estate of the testator should not be applicable to or extend to pay. It also prayed an account of the real and personal estate of the testator, and of what was due on the mortgage.

Mr. *Christian*, Mr. *F. Fitzgerald*, and Mr. *Robert R. Warren*, for the plaintiff.

Under the devise of the mortgaged lands (Annagh and Kilnleck), and of the lands of Coreanidoes, &c., to the trustees to hold upon trust, "first, to fulfil the trusts of my settlement," the plaintiff took a beneficial estate for life, inasmuch as the limitations of the sum of £4000 contained in the settlement must be considered as incorporated with this devise. Unless this be done, if the testator had left children, the Court would exclude them from all benefit in the lands in favour of collaterals. That such was not the testator's intention is manifest, not only from the above devise upon trust, first to fulfil the trusts of the settlement, but from the circumstance that he evidently contemplated the coming into existence of children, and that such an event would deprive C. J. Smyth of any interest in the lands; and to him accordingly, by way of compensation for that disappointment, the testator bequeaths the sum of £500. What meaning can be given to the subsequent passage of the will:—"Should such child or children survive me, my heirs, though life-tenants, can cut, sell and carry away turf-bog off said lands, and cut timber as well off the demesne of Annagh as in the churchyard therein"—unless the testator, who was so evidently *inops consilii*, be understood as here alluding to the persons who would succeed to the enjoyment of the lands under the limitations of the settlement, upon which he considered that he had devised his lands by the first clause in his will? It is evident that by the words "heirs, though life-tenants," which he employs in addition to the words "such child or children," he meant to designate not only his children, but more particularly his wife also, to whom a life interest in the £4000 was limited. The expression "my heirs" is, it is true, both vague and inaccurate; but the construction now suggested is most consistent with the general frame of the will. It may be observed too that the phrase "my heirs" is used in the same large

sense in his commendation of the Tronsons. The testator was but two years married; it was therefore likely that there would have been children of the marriage, and it is in the highest degree improbable that in disposing of his real estate, of which he had kept all out of settlement, he would have preferred to his own children relatives more remote. If children could, under the will, have taken any interest in the lands, it necessarily follows that the plaintiff takes a life estate therein. There was nothing on the face of the will which, in strictness, could be called a trust for the trustees to perform with reference to the mortgage itself. It was optional with the testator to enter into that mortgage. It must be conceded that the clause giving the lands (as well those in mortgage as those not so) to the trustees of the will upon trust to fulfil the trusts of the settlement amounted to a devise of the lands for some purpose. Until those trusts, as they are denominated by the testator, and whatsoever they may be, were performed, he evidently intended that C. J. Smyth should not enjoy the lands. The devise both to the trustees and afterwards to him, so far as it respects Annagh and Kilnaleck, was of the equity of redemption only, that being all which the testator had in those lands to devise. Those lands were already fully subject to the mortgage debt; the devise could not render them more so; if therefore as to those lands it be construed merely as a devise in trust to pay the mortgage debt, the devise would be inoperative, that object being already secured, a fact within the knowledge of the testator. As to those lands of Annagh and Kilnaleck, it is then plain that he intended something more than to devise them as a security for the mortgage debt; and if this be true with regard to those lands, it is equally so with respect to the other lands embraced in the same devise. The only rational interpretation which can be affixed to the first clause of the will, whether taken in the abstract, or in relation to the context, is, that it is a devise, of all the lands named in it, upon the limitations contained in the settlement in reference to the sum of £4000.

Secondly.—The ultimate absolute interest in the £4000, limited (after the decease of the wife, and in the event of there being no children of the marriage) to the testator, passed to the wife under the

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clause of gift to her of "all our furniture, horses and moveables at Chester, as well as all her own fortune not included in our marriage settlement for her sole use as a *feme sole* should she marry again." There was not in the husband's power any other property which had ever belonged to the wife which could satisfy the gift of "all her own fortune not included in the settlement," except that ultimate interest. The case falls within the well-known principle, that a remainder or reversion in fee of lands in settlement will pass under a devise by the remainderman or reversioner of all his lands out of settlement: *Strode v. Lady Russell* (a), which was affirmed in the House of Lords on appeal, *nomine Lytton v. Falkland* (b); *Chester v. Chester* (c). Where by an antenuptial settlement lands were conveyed by the intended husband to trustees to the use of himself for life, remainder to the intended wife for life, remainder to the first and other sons of the marriage in tail, with remainders over, remainder in fee to himself; and the husband by his will devised all his lands *not settled in jointure* upon his wife, the reversion was held to pass by the will, although there were other lands upon which the devise might operate: *Glover v. Spendlove* (d). In *The Incorporated Society v. Richards* (e), Sir Edward Sugden, speaking of those cases, observes:—"These cases show that where a testator speaks of his property 'not settled,' or 'out of settlement,' or to that effect, the Court intends him to mean 'not otherwise disposed of,' and does not hold itself concluded by the fact that the property is included in a settlement providing a jointure or otherwise; it construes the words as referring to all property, whether in or out of settlement, over which, or any part of which, the testator has absolute dominion." He then refers to *The Attorney-General v. Vigor* (f) as precisely a similar case. But the present case is stronger than any of those cited, because the only mode of reading this clause, so as to avoid tautology, is by transposing the words thus:—"I give to my beloved wife *as a feme sole* should she

(a) 2 Vern. 621; S. C. Eq. Cas. Ab. 210, pl. 18; 3 Chan. Rep. 169.

(b) 3 Bro. P. C. 24, Toml. ed.

(c) 3 P. Wms. 25.

(d) 4 Bro. C. C. 337.

(e) 1 Dru. &amp; War. 285; S. C. 4 Ir. Eq. Rep. 177. (f) 8 Ves. 256.

*marry again*, all our furniture, &c., at Chester, as well as all her own fortune not included in our marriage settlement *for her sole use.*" The same effect would be produced on the clause as it stands in the will by placing a comma after the words "for her sole use." This reading at once removes all difficulty in the case, because the £4000 alone were not limited to her separate use by the settlement, the other monies were so settled. Elsewhere throughout his will the testator, whosoever he gives an estate to a female, limits it to her as a *feme sole*—a fact which strongly favours the proposed transposition.

Mr. Greene, Mr. Deasy and Mr. Hemphill (with whom was Mr. Rolleston), for the defendants Margaret O'Reilly and Isabella Cusack.

The word "fulfil" is applicable only to trusts already subsisting, and not to the creation of new trusts. There may not be on the face of the will any thing to be done with respect to the mortgaged estates, which can, in strict technicality, be called a trust; but there is that which the testator would understand as such. He does not in the first clause of the will provide for or contemplate the possibility of issue; and the allusion, which he makes in a subsequent part of the will, to children shows that he (being far advanced in years) thought such an event very improbable. If the defendants be right in the construction of the will on the second point, and that the ultimate interest in the mortgage money did not pass to the wife, but passed to C. J. Smyth as residuary legatee, the passage of the will which contemplates the possibility of the birth of children, and the consequent disappointment of C. J. Smyth, is fully explained by the fact, that such an occurrence would deprive him of any interest in the mortgage money; and for this reason the testator bestows upon him in that event a compensatory legacy of £500. The Court will not import into the will a gift which the testator has not made: *Adams v. Adams* (a); *Doolan v. Smith* (b); *Gough v. Andrews* (c); *Sonday's case* (d). If the limi-

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(a) 1 Hare, 537.

(b) 9 Ir. Eq. Rep. 426.

(c) 1 Col. 69.

(d) 9 Rep. 227.

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tations in the settlement be incorporated into the will, the result will be to nullify all the limitations in the will subsequent to the first clause.

Secondly—It is not the fact that there was not any thing upon which the bequest to the wife of all her own fortune not included in the settlement could operate except the £4000, inasmuch as there was the sum of £356. 5s. which much more accurately answered the description, because it really was not put in settlement. From the nature of the property, viz., horses, furniture, moveables, &c., associated with the gift of all her own fortune, it is probable that the testator meant to give something of comparatively little value, such as the £356. 5s., rather than the £4000, which he never could have regarded as not comprised in the settlement. The cases cited on behalf of the plaintiff, and of which *Strode v. Lady Russell* (*a*) is a leading example, are conversant only of reversions and remainders in real estate. The principle upon which those cases were decided has been justly condemned. Sir J. Mansfield, C. J., in *Morgan v. Surman* (*b*), speaks of *Strode v. Lady Russell* as “a shocking decision.” Although in reference to real property it may be too late to contravene the authority of those cases, at all events this Court will not now outstep them by extending to personal property the application of a subtle and technical principle, which, it must be admitted, leads frequently to results quite foreign to the intention of the testator. The principle of *Strode v. Lady Russell* can be applied only to property over which the testator would have the *jus disponendi*, independently of the settlement. Whereas here he gained that right over the £4000 for the first time by the settlement. And that distinction is supported by the language of Lord Eldon in *The Attorney-General v. Vigor*—a case which has been cited for the plaintiff. The proposed mode of reading the clause is a forced one; the natural mode is to read the words “for her sole use as a *feme sole* should she marry again” in a single sentence, as they have been placed by the testator. All that he meant was merely that whatsoever she took under the gift should be taken to her separate use.

(*a*) *Ubi sup.*(*b*) *1 Taunt. 288, 292.*

There were also mentioned on this branch of the argument the cases of *Church v. Mundy* (*a*); *Welby v. Welby* (*b*), and *Cook v. Oakley* (*c*).

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 —————  
*Judgment.*

The LORD CHANCELLOR.

Upon the first passage in this will, whereby the testator gives to trustees "all his property, real and personal, upon trust to hold the lands of Annagh, Kilnaleck,\* Corcanidoes, &c., &c., first to fulfil the trusts of my marriage settlement, then for my nephew Constantine Joseph Smyth for his life, and after his death to his child or children as he shall appoint, should he die without issue," then over, I should be extremely glad if I could follow the argument on behalf of the plaintiff, and hold her entitled to an estate for life in the real estates named; but it is very difficult to put that construction upon the will, and if not that, to put any rational construction upon it. By the plaintiff's marriage settlement it was declared that the trustees should stand possessed of £7634. 16s. (the property of the plaintiff), in trust to pay £4356. 5s., part thereof, to the testator for his own use in case he should within six months secure by covenant and by mortgage of Annagh and Kilnaleck the payment of £4000, at £5 per cent. interest, to the trustees. In the event of the execution of the mortgage the trustees were to stand possessed thereof, upon trust after the testator's death to pay the interest to the plaintiff during her life, and after her decease in trust for the children of the marriage, and in the event of there being no children, in trust for the executors, administrators and assigns of the testator. He did in fact afterwards execute the mortgage for securing £4000 as so provided; and if he intended to bequeath his real estates upon the same trusts which were declared of the charge, a few words would have done it. But the question is, whether this will has done anything more than bequeath the property, subject to the trusts of the settlement? So far as respects the security of that charge of £4000, I own I cannot put upon the word "fulfil" by itself a construction

(*a*) 15 Ves. 396.

(*b*) 2 V. & B. 187.

(*c*) 1 P. Wms. 302.

\* Annagh and Kilnaleck were the two denominations subject to the £4000 mortgage.

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which would amount to a devise of the property upon the same trusts as those expressed in the settlement. The only words which can be called in aid of such a construction are to be found in a subsequent clause in the will, namely, "I wish to alter a portion of that part of my will above relating to the funded property bequeathed to Margaret Reilly or her family; should my wife have a child by me, they are to pay Constantine J. Smyth, Esq. £500 sterling out of it; should such child or children survive me, my heirs, though life-tenants, can cut, sell, and carry away turf-bog off said lands, and cut timber as well off the demesne of Annagh as in the churchyard therein." I do not know whether the first sentence stops at the words "out of it," or at the words "survive me." Undoubtedly that clause would seem to imply that the coming into existence of a child would defeat a gift to Mr. C. J. Smyth. If he is to be considered as taking the remainder in the £4000 mortgage under the will as residuary legatee, that gift would be defeated by the coming *in esse* of children; and in that view there would perhaps be a sufficient apparent reason for the substituted provision of £500 for Mr. C. J. Smith; but I do not say that under the will he does take any interest in the £4000 mortgage; still I cannot in this part of the will find enough to aid me in the interpretation of the clause in question as affording an argument for giving the construction to the word "fulfil," which is contended for by the plaintiff.

If the wife be not entitled to an estate for life in the real estates, the children of the testator must also have been excluded in favour of Mr. C. J. Smyth and other collateral relatives; and I have in that view of the case struggled, without effect, to put a construction upon the will such as has been contended for on behalf of the plaintiff. The sympathy of the Court is always with a construction favourable to children; and even although there should not happen to be any children, the Court will, if possible, uphold an interpretation which would have conferred interests upon them had they existed.

What the motives of the testator were, or to what extent he meant to provide, or thought of providing, for his children, if he had any, I cannot tell. He may have thought that the interest

which the children took under the settlement in the monies of the plaintiff, including the £4000 which was to be lent on mortgage, would have been sufficient for them if there were any. Perhaps, from the circumstances of this case, he did not contemplate a numerous offspring.\* It may be observed also that the reversion (a remote one) in the real estates would have remained in the children of the testator after the particular estates given to Mr. C. J. Smyth and his children, and the testator's sister Margaret and her children. The passage in which the testator gives permission to such of his heirs as are tenants for life to cut turf is nonsensical unless he thereby meant that he regarded the persons to whom he had given life estates as his heirs. On the whole, I think that the inference sought to be deduced from the passages relied on by the plaintiff are too obscure and uncertain to sustain the construction they contend for.

I shall not determine the question as to the £4000 mortgage until the accounts have been taken in the office; nor shall I insert now in the decree any declaration as to who is entitled to the real estate. When the case comes back upon the report and for further directions it may become unnecessary to argue the question further, because the mortgage may exhaust the whole of the real estate. If any remain, there must then be a declaration in favour of Mr. C. J. Smyth, unless in the interim the opinion of the Court should change.

Subsequently the Lord CHANCELLOR, being of opinion that it would be more convenient that both questions should be at once decided, directed that they should be re-argued.

Upon this day the case was accordingly re-argued by Mr. F. Fitzgerald and Mr. R. R. Warren, for the plaintiff, and by Mr. Greene, for the defendants. The arguments on both sides were, for the most part, a repetition of those previously used. Mr. Greene also cited, upon the second question, *Strong v. Teatt* (*a*), and *Good-title v. Miles* (*b*).

(*a*) 2 Bur. 912.

(*b*) 6 East, 494.

\* The testator was advanced in life at the time of the marriage.

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*Judgment.*

Feb. 10.  
*Argument.*

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Argument.

Mr. *F. Fitzgerald* observed, with reference to the argument that the principle of *Strode v. Lady Russell* applied only to property held independently of a settlement, that had there in the present case not been any settlement, the testator would have taken the £4000 *jure mariti*, and that the settlement was only restrictive of that right, and gave him nothing which he would not have had without it.

Mr. *R. R. Warren* mentioned the case of *Crow v. Noble* (*a*), and said that Sir Edward Sugden (*b*) dissented from the view taken of *Strode v. Russell* by Sir James Mansfield, and had said, in *Tennent v. Tennent* (*c*), that *Goodtitle v. Miles* was overruled by *Doe v. Weatherby* (*d*), *Doe v. Bartle* (*e*), and *Mostyn v. Champneys* (*f*). He also argued that the sum of £356. 5s. was quite as much in settlement as the ultimate interest in the sum of £4000; and that if the Court adopted the reading of the clause giving all her own fortune to the wife, already suggested on her behalf, that the words "for her sole use" became words of description of the property given, which made the case stronger than any of those in which the principle of *Strode v. Russell* had been applied to real property.

Feb. 11.Judgment.

## The LORD CHANCELLOR.

Upon consideration I see no reason to change the opinion which I originally formed upon the first question.

It has been argued that under the first part of this devise the testator could not have intended to confine the trusts of the will to the money fund already secured by the mortgage of the lands specified. I cannot yield to the argument. It is first to be observed that the testator does not devise the lands therein mentioned to the trustees of the marriage settlement, but to new trustees; and it seems to me that the words "to fulfil the trusts of my marriage settlement" will be satisfied by holding the entire lands to have been devised as a

(*a*) Sm. & Batty, 12.(*b*) 1 Dr. & War. 285.(*c*) 1 Jo. & Lat. 388, 389; S. C. 7 Ir. Eq. Rep. 361.(*d*) 11 East, 322.(*e*) 6 B. & A. 492.(*f*) 1 Bing. N. C. 341.

security for the mortgage debt, and to me there appears to be no incongruity in including that debt in those words.

On the second question which has been raised, I am of opinion that the plaintiff must succeed. After some bequests, the testator says:—"I give to my beloved wife all our furniture, horses and moveables at Chester, as well as all her own fortune not included in our marriage settlement for her sole use as a *feme sole* should she marry again." If this question turned merely on the words "not included in our marriage settlement," it would not be distinguishable from that decided in *Strode v. Russell* (*a*). In that case the devisor had an absolute power over the estate, and the devise was of all the testator's lands "out of settlement;" these words were there used in the same sense as the words "not included," or as bearing the interpretation of being "not mentioned" in the previous settlement. I think it might be read as meaning not "bound by" the settlement. In *Chester v. Chester* (*b*) the words used were, "not by him (the testator) formerly settled, or thereby by him otherwise disposed of." The case of *Glover v. Spendlove* (*c*) is still nearer the present case, the words there being, "all my lands not settled in jointure upon my wife;" and in *Richards v. The Incorporated Society* (*d*) the words were, "my said unsettled real estate." These devises appear to me to mean and apply to the property, or the interest in it, at the period of the devise, not taken out of the power or disposition of the testator; and in the will before me I would read these words as meaning a fund not bound by the settlement so as to take it out of my power; and viewed in this light, it appears to me a stronger case than those cited. But the case does not rest here, inasmuch as it seems to me to have been the intention of the testator specially to designate and give to his wife this additional sum of money. The marriage settlement included two funds—one settled to the sole use of the wife, the other not so settled; and the testator, by the words he has used, would appear to have intended to give her the fund not already

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O'REILLY  
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SMYTH.  
Judgment.

(*a*) 2 Vern. 621.

(*b*) 3 P. Wms. 66; S. C. 2 Eq. Ca. Ab. 330, pl. 9.

(*c*) 4 B. C. C. 337.

(*d*) 1 Dru. & War. 258.

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Chancery.  
G'REILLY  
v.  
SMYTH.

Judgment.

settled to her own use, but still to give it to her "as a *feme sole* if she shquld marry again." Similar expressions are used in prior bequests in the same will, and illustrate, I think, the meaning of this.

The word "fortune" is properly used as referring to the provision made for a lady about to be married; and the force of that word cannot, I think, be restrained so as to signify no more than whatever money or other property she may have had independent of the settled money funds. In respect to the words "as well as all her own fortune," I understand him to mean that which was already her own by the terms of the settlement. I find nothing in the will pointing to this part of his property, unless it be in those words. Unless it be so, it must pass with the residue; and the intention of the testator is more likely to have been to restore this property to his wife, of which she had given up one-half without any equivalent, than to keep this mortgage alive against his own estate for the sake of a residuary legatee.

Looking at the indications of intention, the probability of the case, and the language used, I think that the safest conclusion to which I can come is, that the interest in the £4000 passed to Mrs. Reilly under this will.

1 Reg. Lib. Gen. 314, 315.

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Feb. 22.

On this day Mr. *Deasy* and Mr. *Hemphill*, for Margaret Reilly, moved to vary the minutes of the decree by declaring the mortgage a charge on Annagh and Kilnaleck only.

Mr. *Christian*, Mr. *F. Fitzgerald* and Mr. *Robert R. Warren*, contra.

*Per Curiam.*

Refuse the motion with costs, to be paid to the plaintiff as part of the costs in the cause.

2 Reg. Lib. Gen. 67.

1850.  
Chancery.

## BALFE v. BLAKE.

*June 13, 15.*

THE receiver in this cause had for several years duly paid to the head landlord of the lands of Blindwell, in the county of Roscommon, the head rent, subject to which the defendant held those lands. The rent was thus paid up to the 1st of May 1848, but subsequently was suffered to fall into arrear. On the 1st of November 1849 there became due one and a-half year's rent, and on the 20th of December following the landlord obtained the leave of the Court to proceed as he might be advised against the lands. He accordingly caused an ejectment to be brought for recovery of possession of the lands; and in Hilary Term 1850 obtained judgment in the action, and shortly afterwards was put into possession by virtue of a writ of *habere*, issued upon the judgment.

During the period intervening between the 1st of May 1848 and the day of the execution of the *habere*, the receiver (who filled that office also over other lands in the cause) had received from the sub-tenants of the lands of Blindwell sums of money on account of their rents considerably exceeding the amount due for head rent. The monies so received, instead of being applied by him in discharge of the head rent, had been wholly expended by him under an order of the Court in this cause, bearing date the 17th of June 1844, whereby it was provided that he should pay the various specified sums in satisfaction of certain demands therein mentioned, amongst which were annual premiums upon certain policies of assurance, in the keeping up of which he, being considerably in advance to the estate, was deeply interested.

It also appeared that, the sub-lease having expired in the year 1849, the receiver had, by the direction of the Master, set up the lands of Blindwell for letting by public auction, and that the highest

interested, and although he was directed to make those payments by an order of the Court, he was compelled by the Court to pay to the landlord the arrears of head rent.

1850.  
Chancery.

BALFE  
v.  
BLAKE.

Statement.

bidder was the former sub-tenant, who offered a rent less by £23 per annum than the head rent.

On the 3rd of June 1850, Counsel on behalf of William Longfield, the head landlord, moved that Peter M'Keogh, the receiver, be directed to pay to him the sum of £173. 8s., being for three half years' rent of the lands of Blindwell, due and ending the 1st of November 1849, and also the costs of the order of the 20th of December 1849, and of the ejectment proceedings had thereunder, and also the costs of the motion.

This motion was, by his Honour the Master of the Rolls, refused, but without costs (*a*).

The motion was now renewed by way of appeal before the LORD CHANCELLOR.

Argument.

Mr. Brewster and Mr. Drury, for the appellant (the landlord), cited *Elliott v. Elliott* (*b*) ; *Donovan v. Sweeney* (*c*) ; *Sherlock v. Roe* (*d*), and said that the first duty of the receiver was to discharge, out of the sub-rents, the rent due to the chief landlord.

Mr. H. G. Hughes and Mr. Lawless, for the receiver, contended that the sub-rents having been applied conformably to an order of the Court, he who was already so much in advance to the estate ought not to be required now to pay the head rent out of his own pocket.

June 15.

Judgment.

#### The LORD CHANCELLOR.

This is an application by Mr. Longfield, the head landlord of the lands of Blindwell, in Roscommon county, that the receiver in the cause should be ordered to pay to him the sum of £173. 8s., being the amount of head rent due to him for one year and a-half, ending upon the 1st of November 1849, the receiver having during the same period received a larger sum from the sub-tenants in payment of his rents. The case now comes before me on appeal from the decision of his Honour the Master of the Rolls, by whom the motion was refused. In the year 1849, upon a new letting of the lands,

(*a*) 2 Ir. Jur. 236.

(*b*) 1 Ir. Jur. 165.

(*c*) Ibid. 165.

(*d*) Ibid. 167.

the highest bidding did not reach the amount of the head rent. Accordingly, upon the 20th of December in the same year, permission was given by the Court to the head landlord to bring an ejectment, which he availed himself of in Hilary Term in this year, and no defence having been taken, the *habere* was executed in the following February, and he is now in possession. Several cases have been cited in which Courts of Equity have directed payment of his head rent to the landlord—*Sherlock v. Roe* (*a*) ; *Elliott v. Elliott* (*b*) ; *Donovan v. Sweeney* (*c*). However, in all those cases there were funds in the hands of the receiver; in the present instance the receiver is without funds. I am now asked, nevertheless, to order the receiver to pay the head rent, and this involves the consideration of the duties of the Court, when in possession of land, through the medium of its receiver. Now, this Court is bound to act with honesty both to landlord and tenant; and being placed in the position of tenant, to do as a just and honest tenant would do. It holds the rents received from the sub-tenants *in usum jus habentium*. It is responsible in the first instance to the landlord, it being the primary duty of the tenant, and therefore of the receiver over that tenant's interest, to keep down the head rent. So clear is the receiver's duty in this respect, that if, in consequence of his default, the landlord is compelled to institute proceedings for the recovery of his rent, the receiver is held liable for costs if rents have reached his hands. The Court is bound to protect all parties, and were it through its officer to apply the rents received from the sub-tenants to purposes other than those to which they ought to be applied, and leave the head rent unpaid, the landlord might distrain the lands in the possession of the sub-tenants, who would have already paid the receiver. To such a hardship the Court cannot expose them, nor, on the other hand, is it to deprive the landlord of his due. The receiver is the officer upon whom the performance of the obligations imposed by the possession of the land is devolved. His primary duty is to pay the head rent, and this he is bound to do without any special order of the Court to that effect.

(*a*) 1 Ir. Jur. 167.

(*b*) Ibid. 165.

(*c*) Ibid. 165.

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Chancery.  
BALFE  
v.  
BLAKE.  
Judgment.

1850.

Chancery.BALFEv.BLAKE.Judgment.

All that he is at liberty to apply to other purposes is the residue in his hands after payment of the head rent. If the Court has directed the rents to be applied to such purposes, it is bound to keep the landlord free from loss. In this case I must consider the receiver as the person who has made a misapplication of the rents. He, as a creditor against the tenants' estate, was interested in keeping on foot certain policies of assurance, and by an order of the Court he applied the rents in payment of the premiums due upon the policies. I think that he should not be permitted by the Court to act thus, to the prejudice of the landlord. The rents should, as I have already said, have been appropriated in the first instance in payment of the head rent. When that was discharged, whatever surplus remained might have been distributed according to the interests of the parties in the cause and the orders of the Court. If the receiver pursue a different course, and if, paying away the rent received, he chooses to speculate upon obtaining other funds wherewith to pay the head rent, he does not act in accordance with his duty, and must abide the consequences. He may have relief out of other funds applicable to the purposes to which he applied those rents; but the Court is bound to take care that the head landlord should be paid. The decree of his Honour the Master of the Rolls must therefore, I think, be reversed, and accounts taken of what sums have been received by the receiver, and of their application. He is to have his costs as receiver, as he acted *bona fide* according to the terms of the order of the Court, and for the preservation of the interests of the parties.

The parties having subsequently agreed on the amount to be paid to the landlord, the following order was made:—

"Let the receiver within, &c., pay to the said Wm. Longfield the sum of £115. 12s., being the amount of one year's rent due to the said Wm. Longfield to the 1st day of May 1849, and no costs on this motion to the said Wm. Longfield; and let the deposit of £10 made with the Registrar by the said Wm. Longfield be returned to him, and let the receiver

be allowed credit for what he shall pay to the said William Longfield, and also for his costs of appearing on this motion on passing his next account."

*4 Chancery Motion Book, fol. 427.*

1850.  
Chancery.

BALFE  
v.  
BLAKE.

Judgment.

HEARD v. CUTHBERT.

1851.  
June 6.

IN September 1850 Kearney for £1000 agreed to convey certain lands to Heard in fee, subject to a fee-farm rent. On the 7th of October the draft conveyance was approved by Kearney, and the £1000 paid. On the 15th of October the engrossment was handed for execution to Kearney's agent. Kearney was then ill, and died on the 7th of November without executing the deed.

Kearney, by his will made in 1846, devised all his real estates to trustees upon trusts, under which they took the legal estate, and subject to those trusts in trust for his mother for life, with remainder to Thomas Cuthbert, with remainder to his first son in tail, and appointed his trustees executors.

The eldest son of Thomas Cuthbert was an infant at the time of Kearney's death.

For the purpose of binding the estate of the infant the present cause petition was filed, praying for a specific performance of the contract, and the costs of the suit, with reference to which costs the only question in the case arose.

Mr. Brewster and Mr. Robert R. Warren, for the petitioner, relied on *Farran v. Winterton* (*a*), observing that the contract there as to costs merely expressed the rule of conveyancers and of the Court.

Mr. Franks, for the respondents, referred to *Hanson v. Lake* (*b*).

(*a*) 4 Y. & Col. 472.

(*b*) 2 Y. & C., C. C. 328.

Where a party who had contracted for the sale of certain lands died previously to the execution of the conveyance, having by a will, antecedent to the contract for sale, devised all his real estate to trustees (who took the legal estate) upon trust for A for life, with remainder to B for life, with remainder to C, an infant, in tail, a suit for the completion of the contract having been rendered necessary by reason of the infancy of B, the Court decreed specific performance, with costs of the suit.

1851.  
Chancery.  
HEARD  
v.  
CUTHBERT.  
Judgment.

The LORD CHANCELLOR observed that he considered the judgment of Alderson, B., in *Farran v. Winterton*, very satisfactory; that no authority appeared to have been cited in *Hanson v. Lake*; that the present case was stronger than either of those referred to, as here it was by the act of Kearney, devising a property to an infant, that the difficulty had been created, and the expense of the suit occasioned.

Declare the petitioner entitled to a specific performance of the agreement in the petition in this matter stated; and let the same be carried into execution pursuant to the terms of the draft conveyance in the petition mentioned, and the true intent and meaning of the parties to the said agreement: and accordingly refer it to the Master to settle a proper deed of conveyance in fee to the petitioner of the premises in said petition and draft mentioned, with the appurtenances, subject to the yearly rent of £40: and let all proper clauses and provisions be inserted in the first deed of conveyance pursuant to the said agreement and draft: and declare the respondent Thomas Cuthbert the younger a trustee for all his estate in the said premises within the meaning of the Trustee Act, 1850: and let the respondents Thomas Cuthbert, &c., &c., and the petitioner, execute two parts of the deed of conveyance, which shall be settled by the Master: and let the petitioner abide his own costs of the preparation of the conveyance. And it being admitted by their Counsel at the Bar that the respondents Thomas Cuthbert and Abraham Thos. Foster are the acting executors of John Cuthbert Kearney in the petition named, let the said respondents, Thomas Cuthbert and Abraham T. Foster, pay all parties their costs in this matter, including the costs of the said reference, out of the assets of the said John Cuthbert Kearney, when taxed and ascertained.

3 Reg. Lib. Gen. 9.

NOTE—*Vide* Sugden on Vendors and Purchasers, 11th ed., p. 830.

1851.  
Chancery.

**O'BRIEN v. WESTROPP.\***

May 17.

**MR. PERRIN** moved, on the petition in this cause, for an order of reference under the 15th section of the Act. It was presented by a legatee for the administration of his testator's estate, and payment of his own legacy, and charged that the executor (the respondent) had assets in his hands sufficient for the payment of all the debts and legacies.

A similar petition on behalf of another legatee, under the same will, had been presented in the course of a previous Term, and an order of reference to the Master was made upon it; the executor did not appear in the office, although served with notice of that order, and Master Brooke, being of opinion that the executor must therefore be taken to have admitted assets to meet the demand then put forward, made a personal decree against him, but declined to permit the present petitioner to file a charge under the order, as he (the Master), in the absence of the executor, would not take an account under the first petition in respect of other parties, the immediate claim having been provided for.

The petition now before the Court was accordingly presented for the purpose of obtaining a similar order of reference, on which a like decree might be pronounced in the office.

The **LORD CHANCELLOR** at first seemed to think that the Master ought to have received the charge under the former order, and hesitated to make the second, lest it might afford a precedent for the presentation of several petitions for the administration of the estate of one testator; but after consulting with the Registrar, and

tion by him in order to enforce his demand.

\* *Ex relatione ALFRED M'FARLAND, Esq.*

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Chancery.  
 O'BRIEN  
 v.  
 WESTROPP. granted the application.

Judgment.



MARY JANE DALY

v.

The Rev. JOHN WADE, M. BRETT and another.\*

May 17.

Cause petitions under the Court of Chancery Regulation Act are not *pleadings*, of which attested copies must be taken out at the Rolls office, before answering affidavits will be received there.

Statement.

The petition was a voluminous one; interrogatories had been annexed to it, and the respondent required to answer them; he had been therefore furnished with a copy of the latter pursuant to the 9th section of the Act, and his affidavit in reply was now ready to be filed; but the officer would not receive it unless an attested copy of the petition was first taken out, or the sum of £5 lodged as a deposit, in order to meet the expenses of that copy when made.

*Mr. William Smith*, for the motion.

Argument.

This refusal rested on the supposition that the petition should be viewed as within the meaning of the words, or be dealt with in the same way as a "bill" or "other pleading," as used in the 7th of Primate Boyle's Rules,† which directs (amongst other things) "That no Counsel or any of the Six-clerks do draw any answer to a bill without having an attested copy of the bill before him, nor any replication without having an attested copy of the answer, and so of

\* *Ex relatione ALFRED M'FARLAND, Esq.*

† See Appendix to O'Keeffe's General Orders, p. 3.

other pleadings; and in case any such pleadings shall be tendered at the Rolls office, when a copy of the former pleading has not been taken out as aforesaid, the Clerk of the Rolls may refuse the filing thereof;" and the General Orders of 1843 do not annul this Rule. But it cannot interfere with the provisions of the Chancery Regulation Act. Whatever wisdom there may have been in adhering to it in the case of a bill, which must be signed by Counsel, it should not now be extended to a cause petition. Under the old practice the answer to a bill could not have been drawn unless the pleader had before him a full copy of the latter, as the defendant was expected to meet every material allegation in it, whether he was interrogated to the point or not; and even according to the modern practice, the necessity is almost as great, the frame of the bill always requiring a careful consideration, as the draftsman has still to choose between an answer, plea or demurrer; but as regards a cause petition, which may be prepared in a much less technical form than a bill, and is not necessarily signed by Counsel, the respondent need not reply to it until he has been served with a copy of the interrogatories; and the general policy of the Chancery Regulation Act is to put an end to the former system of pleading as far as possible, and to diminish the expenses of the suitor; while the officers of the Court, being paid by fixed salaries, would sustain no loss from the adoption of the argument now advanced.

Under these circumstances it would be both a hardship and an injustice to render it imperative on a respondent, before he can file his affidavit in answer, to pay for an attested copy of the petition, with the more material part of which he has been already supplied, and the remainder of which may be almost, if not entirely, useless to him. Nor does *Birch v. Hutchinson* (a) govern the present case, though based on the Primate's Rule. It decides that, as a consequence of that Rule, and notwithstanding the 4 & 5 W. 4, c. 78, s. 17,\* which is to be read in connexion with the 4th section of that

(a) 1 Ll. & G. 603.

\* By this section it is enacted, "That no person shall be compelled or required to take or pay for any copy of any paper or documents, being in any office of the VOL. 1.

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Act,\* a replication cannot be filed in an ordinary suit by bill and answer without an office copy of the latter being previously taken out.† But this decision does not apply here; for the Rule expressly requires that in such a suit an attested copy of the answer—as one of “other pleadings”—shall be taken out before a replication is filed; but, for the reasons already stated, a cause petition ought not to be deemed a pleading of any sort, in the sense of the term employed in the Rule; it should rather be treated as a petition in a minor or other *matter*, of which the respondent is not under any obligation to take out an attested copy, as a condition precedent to the filing of his affidavit in reply. Besides, the demand now put forward is at least premature. The 10th section of the Chancery Regulation Act empowers the Lord Chancellor, with the assistance of the Master of the Rolls, to settle a table of fees to be taken in the office of the Deputy-keeper of the Rolls, in respect of petitions, affidavits, &c., and yet such a table has not been prepared.

#### THE LORD CHANCELLOR.

Judgment.

I have no doubt that the cause petitions and other documents under the Chancery Regulation Act are not *pleadings* within Primate Boyle’s Rule; and to hold otherwise would defeat the purposes of the Act to a great extent. I make no question in my own mind as to this; but as the fees paid to the Deputy-keeper of the Rolls, for the attested copies of *pleadings* under the old system, go to the suitors’ fund, and if that prove deficient for its purposes, the loss may fall upon the consolidated fund, I shall consider, before I finally dispose of the application, whether I should not call upon

Court; and that every person shall be at liberty to take out and pay for only so much or such part of any papers or documents, being in any office of the Court, as such person may require, without being in any case compelled to take out or pay for the entire of the papers or documents being in the office.”

\* This provides, “That any person shall be at liberty to take an office copy of so much only of any decree, order, report, or exceptions, as he may require.”

† Although after the pleadings are concluded, and a decree made, an answer is a paper or document within the 17th section, of which, as a link in the cause, the suitor may have a partial copy: *Birch v. Hutchinson* (1 Ll. & Goold, 603).

The Solicitor-General to attend on behalf of the Crown, and to offer any arguments that may occur to him as likely to alter my opinion.

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WADE.

May 19.  
*Judgment.*

His Lordship again referred to this case, and said :—

I must hold that a cause petition is not a pleading within the 17th of Primate Boyle's Rules. Ordinary petitions are clearly not so. The 79th of those Rules applies to them, and puts them on a different footing from bills and the like by directing that they should be perused and signed by the Six-clerks,\* as distinguished from Counsel, who, by the introductory portion of the 17th Rule, are expressly required to sign the other. The Chancery Regulation Act takes, as its basis, proceedings by this common species of petition ; and it was never intended to convert them into formal pleadings. I had at first thought that I might hear Counsel for the Crown before I disposed of the motion ; but having since considered the matter, I will not throw any doubt upon it by asking for further discussion. I am of opinion that the Deputy-keeper of the Rolls is bound to receive the respondent's affidavit without obliging him to pay for taking out an attested copy of a petition, for which he may have no use ; and even should the Revenue suffer, that is no reason why suitors should be saddled with such an unnecessary burthen. I must therefore grant the application.

\* "That no petition be admitted to be read without being first perused and signed by one of the Six-clerks."—*App. to O'Keeffe's General Orders*, 23.

1850.

Chancery.

Nov. 7.

Dec. 6, 9.

1851.

Feb. 14.

**ELLARD v. COOPER.**

Where special-  
ty debts of a  
deceased per-  
son have been  
paid out of his  
personal es-  
tate, and at the  
time of such  
payment the  
personal estate  
was sufficient  
also to pay his  
simple contract  
debts, and the  
executor sub-  
sequently com-  
mits a devas-  
tavit, which  
renders the  
personal estate  
insufficient to  
pay simple  
contract credi-  
tors, they are  
entitled to be  
paid out of the  
real estate of  
the debtor to  
the extent to  
which the per-  
sonal estate  
has been oner-  
ated by the  
specialty cre-  
ditors.

The dictum  
of Lord Clare,  
in *Kearnan v.  
Fitzsimon* (3  
Ridg. P. C.  
16), that "the  
rule of mar-  
shalling assets  
holds only  
where it is pro-  
per to be done  
at the death  
of the party,  
whose assets  
are to be mar-  
shalled, and can never arise upon any subsequent fact or accident," considered.

Simple contract creditors, who have, in consequence of the payment of specialty creditors out of the personal estate of the deceased debtor, acquired a right of mar- shalling his real estate, are not barred under the Statute of Limitations by the lapse of less than twenty years.

*Vickers v. Oliver* (1 Y. & C., C. C. 211) approved of.

Austen Cooper out of the real and personal estate of Letitia Burke, he had duly administered £2955. 5s. 3d., and that there was then due to the plaintiff £1218. 14s. 6d. for principal and interest on the legacies of £400 and £100. The report also found that at the time of his death Austen Cooper was seised in fee of real estate in the counties of Dublin and Donegal, and that out of his personal estate and the proceeds arising from the sale of the real estate in Donegal a sum of £22,027. 17s. 6d. had been received by his executors, whereof they had duly administered a sum of £15,249. 12s. 6 $\frac{1}{2}$ d. By the final decree in that cause, made on the 29th of November 1842, John Turner Cooper and Samuel Cooper were directed to bring into Court £3029. 15s. 8d., the sum ascertained to be due by Austen Cooper in respect of the real and personal estate of Letitia Burke; and it was declared that in default thereof the plaintiffs might enforce payment of their demand out of his real and personal estate. This sum of money was not brought into Court by John Turner Cooper and Samuel Cooper.

In the Court of Exchequer a bill was filed by William Cooper, one of the defendants in the suit, against John Turner Cooper and Samuel Cooper the younger, on foot of an equitable mortgage for £10,000, made to him (William Cooper) on the 19th of November 1819. By his report of the 14th of January 1843, made in that cause, the Remembrancer found that the sum of £10,143. 8s. 9 $\frac{1}{2}$ d. was due on foot of the mortgage to William Cooper; that John Turner Cooper had in his hands a sum of £7528. 7s. 5d. unapplied or misapplied; that Samuel Cooper the younger, as devisee of Austen Cooper, had received a sum of £770, the produce of the sale of a house, and had received as his executor the sum of £210, amounting in the whole to £980. 18s.

By a final decree pronounced in that cause on the 6th of February 1843, it was ordered that the defendant John Turner Cooper should lodge in Court the sum of £7528. 7s. 2 $\frac{1}{2}$ d., and that Samuel Cooper should lodge the sum of £210. 18s., and that both of those sums should be applied towards the payment of certain sums found due for principal, interest and costs on two judgments obtained against Austen Cooper, and of the sum found due to William Cooper, the

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 —————  
*Statement.*

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plaintiff in that suit, in respect of his equitable mortgage; and in default thereof, that the real estate of Austen Cooper should be sold, and the proceeds of the sale applied in payment of the two judgments and the equitable mortgage.

By an order of the 24th of June 1844, Elizabeth Ellard (plaintiff in the Chancery cause of *Ellard v. Cooper*, and in the present suit) was permitted to prove her demand in the Exchequer cause of *Cooper v. Cooper*; and by an order made on the 9th of February 1844, notice of all proceedings in that cause was directed to be given to her.

The bill filed in the present cause in the Court of Exchequer stated that John Turner Cooper and Samuel Cooper not having lodged the monies in Court, as directed by the decree of the 6th of February 1843 in *Cooper v. Cooper*, the real estates of Austen Cooper were set up for sale, and that a large portion of his personal estate and of the proceeds of part of his real estate, sold in pursuance of directions contained in his will, had been applied in payment of interest due on the equitable mortgage of William Cooper, and that sums due upon several judgments had been paid out of his personal estate.

The bill also charged that the plaintiff was entitled to have the amount of her demands, which had been proved against Austen Cooper in respect of the assets of Letitia Burke, paid out of his real estate to the extent to which his personal estate had been applied in discharge of interest, on the equitable mortgage of William Cooper, and in payment of the judgments; and it also charged that John Turner Cooper and Samuel Cooper had misapplied the assets of Austen Cooper to a considerable amount, and prayed that the plaintiff should be declared entitled to the benefit of all the proceedings and accounts in *Cooper v. Cooper*, and that an account should be taken of the sum due to the plaintiff in respect of the legacies of £400 and £100, and also an account of the debts of Austen Cooper; and that, if it should appear that all his personal estate had been exhausted, in that case the plaintiff and his other simple contract creditors should be declared entitled to stand *pro tanto* in the place of William Cooper (the equitable mortgagee), and of the judgment

and specialty creditors of Austen Cooper, whose demands had been satisfied out of the personal estate.

The will of Austen Cooper, after referring to the equitable mortgage, contained the following passage :—“ Now, I do hereby charge all my said estate of Kinsealy with payment of all and every sum of money which, at the time of my decease, I owe to my said brother (the equitable mortgagee); and to avoid any question, between my said sons John Turner Cooper and Samuel Cooper, of apportionment of said debt, I hereby order and direct that as between my said sons, and all in remainder to them, each of the said two divisions of said lands shall bear and pay one full moiety of said debt, and both divisions of the said lands nevertheless being, so far as regards the security of the said debts, chargeable with the entire thereof. And I hereby further declare, and my will is, and I hereby order and direct, that my personal estate and other funds hereby provided in aid and augmentation thereof for payment of my general debts be first applied in payment of all my other debts, and that the residue or surplus of the said funds, if any, may be applied in the next place, so far as the same may extend, in or towards payment or satisfaction of the said debt to my said brother in exoneration, as far as same may be, of the said lands of Kinsealy.”

On the 23rd of April 1846, a decree to account was pronounced in the present suit by the Court of Exchequer, and by his report, bearing date the 18th of November 1847, the Chief Remembrancer found due to the plaintiff Elizabeth Ellard, as personal representative of Letitia Burke, for principal and interest, the sum of £3675. 3s. 8d., and to the Commissioners of Charitable Donations and Bequests £3634. 1s. 10 $\frac{1}{2}$ d.;\* that a sum of £518. 16s. 2d. had been applied out of the personal estate of Austen Cooper by John Turner Cooper in payment of interest on certain judgment debts due by Austen Cooper, and that £2223. 1s. 5d. out of the same personal estate had been applied by John Turner Cooper in payment of interest to William Cooper upon his equitable mortgage, and that more than sufficient sums were received by John Turner Cooper and Samuel Cooper out of the mortgaged lands (Kinsealy), of which they were the devisees for life under the will of Austen

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 Statement.

\* As to this finding, *vide infra* p. 386.

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Cooper, to enable them to keep down the interest on the mortgage to William Cooper, it appearing by the report of the 14th of January 1843 in *Cooper v. Cooper*, that those lands were of the annual value of £1442, and that the interest on the mortgage amounted only to the annual sum of £461. 10s. 9d.

The present cause having come on to be heard before the Court of Exchequer upon the foregoing report of the 18th of November 1847 unexcepted to, for further directions, it was for the plaintiff contended that upon the general rule of marshalling assets, and also upon the above-mentioned clause contained in the will of Austen Cooper, the plaintiffs were entitled to stand as against the real estate of Austen Cooper in the same position as the specialty creditors, who had been paid out of his personal estate, had stood.

The case before the Court of Exchequer is reported in the 1st vol. of the *Irish Jurist*, p. 27, from which the following extracts from the judgments of Pennefather, B., and Richards, B., are by permission made:—

Pennefather, B., referring to the clause in the will of Austen Cooper, observed:—"It appears to us that the case of the interest paid on foot of the judgments is not embraced in that clause, and as to that portion of his demand the plaintiff must rest on the general rule of equity alone, so that the sums paid on account of the interest due on foot of the mortgage and on foot of the judgments do not stand on the same footing. The defendants insist, in the first place, that the plaintiff had no right to file her bill in this Court, but ought to have proceeded in Chancery to sequestration on the decree obtained there against the real estate of Austen Cooper; secondly, that this debt as to the realty is barred by the Statute of Limitations, and that by the report in *Cooper v. Cooper*, adopted here, at the death of the testator, his personal estate was found sufficient to pay not only the interest on the specialty debts, but all his simple contract debts; and if that fund was subsequently reduced by the executors, or if they have committed a devastavit, the general rule of equity does not apply, as if the fund was originally adequate at the time of the testator's death, its subsequent deficiency does not entitle the plaintiff to resort to the real estate. It is

argued on the other hand for the plaintiff, that no matter at what point of time the deficiency occurred, whether by failure of a security, or devastavit by executors, yet, if the specialty debts had gone to exhaust the personal assets, the general equity would arise. The view taken by the Court on the point differs from both these positions. The time of the testator's death is not, in the opinion of the Court, the period at which to ascertain the state of the personal fund in reference to the payments made out of it; the time is that of the payment of the specialty debts; and if at that period the personality is sufficient to answer the interest on the specialty debts, as well as the simple contract debts, in that event the heir is not to suffer by the devastavit of the executors." And again:—"The principle is this, that if the specialty creditor exhausts the fund to the prejudice of the simple contract creditor, the simple contract creditor shall stand in his place; that is, if he exhausts the assets to the prejudice of the simple contract creditor at the time that he is paid; or in other words, if at that moment he leaves enough to satisfy the simple contract creditor's demand, then the latter has no right to complain, for it is by his own negligence that he fails to realise his claims, and that is the principle of all the cases. This is the true principle—a principle for which, indeed, we have failed to find any express authority; but there are expressions and *dicta* which fully warrant our conclusion. The personal fund cannot be said to be exhausted if enough is left at the time of the discharge of the specialty claims. The question is, between the heir and simple contract creditor, whether the heir shall be obliged to pay twice over the same sum?"

Richards, B., observed, that "If there were no funds available to pay the simple contract debts after payment of the specialty debts, no default should operate the executor with the amount of the personal assets so properly applied; but if at the time when the specialty debts were paid, the executor, in consequence of his having wasted the personal assets, were unable to make them available for the benefit of the simple contract creditors, or if it were not sufficiently shown that there were then sufficient assets to pay the simple contract debts, then an inquiry should be directed as to their

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—  
*Statement.*

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sufficiency, and if sufficient, he is guilty of a devastavit, if not, the specialty creditors have got the fund properly, and it is not possible to charge the executor with the deficiency."

From the opinion of Pennefather, B., and Richards, B., upon that occasion, Lefroy, B., differed. The following is a full report of the judgment then delivered by him:—

Lefroy, B.—We have felt considerable difficulty in this case, arising from an opinion reported to have been expressed by Lord Clare in the case of *Kearnan v. Fitzsimon* (*a*), from which it has been argued that his Lordship meant to lay down, that where sufficient personal estate was left to pay all debts, and part was applied to pay specialty debts affecting the real estate, and the residue was lost by a devastavit, that the simple contract creditor was not entitled to have the assets marshalled in such a case. The answer to this argument was, that it was an *obiter dictum*, not necessary to the decision of the case; but I am very much disposed to think that the meaning ascribed to the passage referred to in Lord Clare's judgment is not what was intended, and that his Lordship only meant to say that the demand, in virtue of which a party could claim to have assets marshalled, must have existed at the death of the party whose assets were to be marshalled; and that under the circumstances of that case no such demand could be considered to have then existed. But if he meant what has been contended in the argument of this case, I must say it does not appear to me that the authorities warrant that proposition. In my opinion the rule as to marshalling assets does not depend on the sufficiency or insufficiency of the personal estate at the death of the testator; it never has been put on that ground. The principle of the rule is this:—"That where a person having two funds, by resorting to one disappoints another person who has only that one, this latter person shall stand in his place against the other fund." The right arises from the *application* of a fund for the benefit of one party to the disappointment or prejudice of another: *Trimmer v. Bayne* (*b*). The principle is not at all founded on the state of the fund at the death of the testator, but on its subsequent application. The rule I

(*a*) 3 Ridg. P. C. 16.(*b*) 9 Ves. 210.

take to be correctly laid down in the note to *Clifton v. Burt* (a) :— “If a specialty creditor, whose debt is a lien on the real assets, receive satisfaction out of the personal assets, a simple contract creditor shall stand in the place of the specialty creditor against the real assets so far as the latter shall have exhausted the personal assets in payment of his debt.” The application of the rule depends on the fact of the specialty creditor having *received* payment in the whole or in part out of the personal assets, and on their insufficiency to pay both, from whatever cause arising. Indeed the very terms of the decree for marshalling assets shows this most clearly. They are :—“In case the creditors by specialty should *exhaust any part* of the personal estate, it is declared that the simple contract creditors are entitled to stand in their place *pro tanto* against the real estate.” There is no authority for the proposition that this right of the simple contract creditor, to be recompensed out of the real estate for what has been so applied, is lost by a devastavit of another part of the personal assets. Indeed the right of the heir, whether *haeres natus*, or *haeres factus*, to have the personal estate applied in exoneration of the real, is subordinate in equity to the right of the simple contract creditor to be paid his demand. The simple contract creditor cannot come against the real estate for any portion of the personal assets lost by a devastavit; but that is no reason why he should not have this equity as to what is not lost, but is applied to his prejudice in exoneration of the real estate. The specialty creditor has two funds for his security—the real and personal estate; and though the real estate may be considered as the secondary fund, yet, even in this view, it is liable to the rule as to marshalling, which Lord Eldon says expressly applies to the fund, “whether it be primary or secondary” (b). If the case may be considered as one of principal and surety, and the heir in the light of a surety, pledged only in the second degree, still it is his duty to see the simple contract creditors paid if he wishes to be secure. As surety he may undoubtedly call on his principal to pay; but if he remain quiescent, he must take the consequences if the principal should become insolvent, or (as here) the primary fund should fail, there being only a mere *non-feazance*

(a) 1 P. Wms. 680.

(b) 9 Ves. 210.

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by the simple contract creditor. Should the heir-at-law file a bill, as was done in *Howel v. Price* (*a*), to compel the executor to apply the personal estate in exoneration of the real estate, by that very bill provision must be first made for payment of the simple contract debts before any part of the personal estate can be applied to exonerate the real. The case of *Pollerfex v. Moore* (*b*) appears to me a decisive authority for the view I take, and that the state of the fund at the death of the testator is not the criterion for applying the doctrine of marshalling. The decree of Lord Hardwicke, as stated in the note from the Registrar's book, directs an account to be taken of the personal estate of the testator, which came to the hands of the executor, and its sufficiency to pay all the debts, and then an inquiry as to the sufficiency of the assets of the executor to answer for what he received; and in case, by reason of a deficiency thereof, the personal estate of the original testator be not now sufficient, then the deficiency should be made good by sale of the real estate, &c. Upon these grounds, I am of opinion in this case that the simple contract creditor is entitled to be recompensed out of the real estate the sums paid in exoneration thereof.

The decree of the Court of Exchequer in this cause then (the 24th of June 1848) pronounced declared that as to the sums applied in discharge of the interest of the mortgage, the plaintiffs and other simple contract creditors of Austen Cooper were upon the true construction of his will entitled to stand in place of the mortgagee for recovery of those sums out of the estate, subject to the mortgage, to the extent and in the manner that the mortgagee would have been entitled to levy the same, and referred it to the Remembrancer to inquire and report whether, at the several times of payment of the several sums in the report in *Cooper v. Cooper* mentioned, in part discharge of the interest of the judgments, there was personal property of Austen Cooper forthcoming, and available and sufficient for payment of the sums so paid for interest, and for payment of his simple contract debts, or to any and what extent; and whether that personal property was still available, and if so, to what extent; and whether there was any personal estate of Austen

(*a*) 1. P. Wms. 294.(*b*) 3 Atk. 272.

Cooper, not mentioned in the report in *Cooper v. Cooper*, which could be made available for the purpose, and also whether the defendant John Turner Cooper was in insolvent circumstances, and if he were, when he became so; and if the Remembrancer should find that there was personal property of Austen Cooper sufficient, available and forthcoming for the purpose aforesaid at the time of the above mentioned payments, that he should inquire and report whether the plaintiff, or other simple contract creditors of Austen Cooper, could by reasonable diligence have levied their demands or any portion of them out of the personal estate. And the defendant Samuel Cooper was ordered to lodge in Court the sum of £770, the produce of the sale of the house already mentioned.

By his report, filed on the 28th of January 1850, the Chief Remembrancer found that at the several times of the payment of the several sums mentioned in the report in *Cooper v. Cooper* in part discharge of the interest of the judgments, there was personal property of Austen Cooper forthcoming, available and sufficient for payment of his simple contract debts; that there was not then (at the date of this report) any personal estate available, nor was there any other personal estate in the report in *Cooper v. Cooper* which could be made available for the purpose; that John Turner Cooper was in insolvent circumstances, and became so previously to the 11th of May 1837. That the plaintiffs could not by reasonable diligence have levied their demand or any portion thereof out of the personal estate, which was at the times aforesaid forthcoming, available and sufficient for the payment of the simple contract debts of Austen Cooper, for the plaintiff's demand was not recoverable by action or suit at law, nor was the amount ascertained at the death of Austen Cooper on the 13th of August 1830, or until the 29th of November 1842, when a decree was pronounced for the payment thereof in a suit in the Court of Chancery, instituted by her against the executors of Austen Cooper, who denied the existence of her demand in that cause. This report then stated the proceedings already mentioned in that cause, and the disobedience of the defendants to the decree of the 29th of November 1842, ordering them to

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lodge £3029. 15s. 8d. in Court. That that cause was prosecuted with due diligence; that all the other simple contract creditors of Austen Cooper were paid, except the Rev. Messrs. Roe and Pack, the trustees of a bequest for charitable purposes under the will of James Switzer, and the Commissioners of Charitable Donations and Bequests, of which will Austen Cooper was executor, in respect of which bequest the Commissioners of Charitable Donations, &c., had filed on the 22nd of January 1838 a bill in Chancery against the executors of Austen Cooper,\* praying an account of his personal estate, in which suit a decree to account was pronounced in June 1841, and a report made in 1843; that the trustees or the Commissioners of Charitable Donations, had the Commissioners been apprised of the withholding, by the executors of Austen Cooper, of the bequest, could by reasonable diligence have levied their demand out of the personal estate which was at the several times aforesaid forthcoming, &c., for payment of the simple contract creditors of Austen Cooper, had they instituted the proper proceedings at his death, and prior to the insolvency of John Turner Cooper, and therefore the Chief Remembrancer found that the trustees of the bequest had not used due diligence.

To this report the Commissioners of Charitable Donations excepted, insisting that the Chief Remembrancer should have found that they "could not by reasonable diligence have levied their demand or any portion thereof out of the personal estate which was forthcoming, &c., for payment of the simple contract creditors of Austen Cooper.

Upon the 1st of August 1850, the jurisdiction of the Court of Exchequer as a Court of Equity ceased by virtue of the statute 13 & 14 Vic. c. 51, and was conferred upon this Court; and under the 2nd section of that Act the present suit was transferred to this Court.

Nov. 7.

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Upon this day the case came on to be heard before The LORD

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\* Austen Cooper had during his lifetime made regular payments to the trustees on foot of the bequest.

CHANCELLOR upon the report of the 28th of January 1850, the exception, merits and further directions.

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Mr. *Thomas Lefroy*, for the Commissioners of Charitable Donations and Bequests, suggested that his Lordship might think this cause in such a condition as might induce him to remit it under the statute 13 & 14 Vic. c. 51, s. 2, to be heard by the Court of Exchequer.

**The LORD CHANCELLOR.**

The words in that section are "partly heard," and refer to causes actually at a hearing, which hearing has not been concluded, having been either interrupted or adjourned. The last hearing before the Court of Exchequer was at an end when that Court made the order of reference, upon which the Chief Remembrancer's report of the 28th of January 1850 is founded. This cause is not therefore, in my opinion, one which can be considered as but "partly heard."

Mr. *Thomas Lefroy* then argued in support of the exception taken by the Commissioners of Charitable Donations to that report.

**The LORD CHANCELLOR.**

I think that the report is in this respect right. The question is, whether there is any thing to distinguish this bequest from an ordinary simple contract debt? As against the assets of Austen Cooper it was such a debt. The amount would appear to have been actually set apart by him during his lifetime. It was the duty of the Messrs. Roe and Pack to see that it was properly invested in their names. It is impossible to say what their reasons were for not doing so. At all events, upon his death, in 1830, they ought to have required the executors to have transferred the fund to them. By the decree in this Court, in *The Commissioners of Charitable Donations v. Cooper*, the right to receive the legacy was transferred to the Commissioners. But I do not see how, with regard to the *laches*, they can be considered in any better position than Messrs. Roe and Pack. If in 1837 this debt was, as a simple contract debt, barred

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as against those gentlemen, it was in my opinion equally so against the Commissioners. The exception must be overruled.

His Lordship, being of opinion that in consequence of the order of reference in the decree of the 24th of June 1848, made by the Court of Exchequer, he could not safely enter into the consideration of the other questions in the cause, directed that it should stand over in order that a petition of re-hearing might be presented.

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*Dec. 6, 9.* A petition of re-hearing having been presented, the case was upon those two days argued at great length.

*Argument.*

Mr. Serjeant *O'Brien*, Mr. *Greene* and Mr. *Maley*, for the plaintiff Mary Ellard (who, as personal representative of Elizabeth Ellard, revived this suit upon her death), insisted—first, that as a simple contract creditor she was entitled to stand in the same place as against the real estate of Austen Cooper as the specialty creditors who had been paid out of the personal estate; and secondly, that the plaintiff accordingly was not barred by the Statute of Limitations, twenty years not having elapsed since the accrue of the right of the original plaintiff Elizabeth Ellard. Upon the first point they cited *Prowse v. Abingdon* (a); *Lawrence v. Blake* (b); *Seton on Decrees*, pp. 88, 96, 97, 102, 207; *Aldrich v. Cooper* (c); *Pearce v. Loman* (d); *Lanoy v. Athol* (e); *Hanby v. Roberts* (f); *Wilson v. Fielding* (g); *Sagitary v. Hyde* (h); *Trimmer v. Bayne* (i); *Gibbs v. Ougier* (k); 2 *Roper on Leg.* 979, 4th ed.; *Herne v. Meyrick* (l); *Culpepper v. Aston* (m); *Tipping v. Tipping* (n);

(a) 1 Atk. 482, 486; S. C. West's Rep. temp. Hardwicke, 312.

(b) 8 Cl. &amp; Fin. 504, 537.

(c) 8 Ves. 382.

(d) 3 Ves. 135.

(e) 2 Atk. 446.

(f) Ambl. 127.

(g) 2 Vern. 763.

(h) 1 Vern. 455.

(i) 9 Ves. 210.

(k) 12 Ves. 413.

(l) 1 P. Wms. 201.

(m) 2 Chan. Ca. 117.

(n) 1 P. Wms. 729, 730.

*Westfaling v. Westfaling (a); Baldwin v. Belcher (b); Conolly v. McDermott (c); Wright v. Simpson (d); Wright v. Morley (e); Powell v. Robins (f).*

As to the second point, they cited *Vickers v. Oliver (g); Busby v. Seymour (h); Putman v. Bates (i)*.

As to the necessity of an infant raising the defence of the Statute of Limitations in his answer, *Lane v. Hardwicke (k); Harrison v. Boswell (l)*.

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Mr. Thomas Lefroy, for the Commissioners of Charitable Donations and Bequests, relied on both the points raised by the plaintiff, and also cited upon the first point (marshalling) *Pollexfen v. Moore (m); Sugden's Vendors and Purchasers*, p. 873, 11th ed.; *Howel v. Price (n); Clifton v. Burt (o); Mayhew v. Crickett (p)*.

Mr. Brewster and Mr. William Smith, for Austen Cooper, jun. (an infant), devisee in remainder of a moiety of the real estates of Austen Cooper, resisted both propositions put forward on behalf of the plaintiffs and the Commissioners of Charitable Donations, and relied upon the *dictum* of Lord Clare in *Kearnan v. Fitzsimon (q)*, and also cited *Boyd v. Belton (r); Rainsford v. Ryan (s) and Blake v. Lawrence (t)*.

Mr. Rollestone, for the Rev. Austen Cooper and his son, cited *Cox v. Bateman (u)*.

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| (a) 3 Atk. 467.                                 | (b) 1 Dr. & War. 173.      |
| (c) 3 Jo. & Lat. 260.                           | (d) 6 Ves. 714.            |
| (e) 11 Ves. 22, 23.                             | (f) 7 Ves. 209.            |
| (g) 1 Y. & C., C. C. 211.                       |                            |
| (h) 1 Jo. & Lat. 527; S. C. 7 Ir. Eq. Rep. 433. |                            |
| (i) 3 Russ. 188.                                | (k) 9 Beav. 148.           |
| (l) 10 Sim. 382.                                | (m) 3 Atk. 272.            |
| (n) 1 P. Wms. 294.                              |                            |
| (o) 1 P. Wms. 680, and Mr. Cox's note.          |                            |
| (p) 2 Swanst. 191.                              | (q) 3 Ridg. P. C. 1, 16.   |
| (r) 8 Ir. Eq. Rep. 113; S. C. 1 Jo. & Lat. 730. |                            |
| (s) 2 Ir. Jur. 277.                             | (t) 8 Cl. & Fin. 504, 537. |
| (u) 2 Ves. sen. 18.                             |                            |

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Mr. *F. Walsh*, for the defendant Samuel Cooper, one of the devisees of a moiety of the real estates of Austen Cooper for life.

Mr. *Macartney*, for William Cooper, eldest son and heir-at-law of Austen Cooper.

Mr. *Cooke*, for the Earl of Leitrim, a formal party.

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The LORD CHANCELLOR.

This case came before me first on exceptions, and afterwards on petition of re-hearing of a decree of the Court of Exchequer, where this cause was originally instituted.

The bill was filed by certain simple contract creditors of Austen Cooper, who claim to be paid out of his real estate, and they make the common case of simple contract creditors to marshal assets. There is also a question with regard to a mortgage, resting on a particular provision in the will of Austen Cooper, which expressly provides for the payment of it out of the real estate in the event of a deficiency of the personal estate, independently of the general doctrine. But on the general doctrine the mortgage and the judgment stand on the same footing. The bill was resisted upon two grounds; first, that the plaintiff's demand was barred by the Statute of Limitations, though it had been a subsisting debt at a period subsequently to the death of Austen Cooper; secondly, that personal assets had come to the hands of his executor amply sufficient to pay the simple contract debts, and the debts which had been paid in exoneration of the real estate; that those assets had been wasted by the executor, and that consequently simple contract creditors could not claim a right to marshal the assets and to come against the real estate by reason of the deficiency of the personal assets, that having arisen from the devastavit of the executor. As a simple contract debt it was admitted that it would have been barred by the Statute of Limitations; but the plaintiff by his bill seeks to stand in the place of the specialty creditors, who have been paid out of the personal estate, and that such being his right, the demand is not barred,

appears from *Vickers v. Oliver* (*a*). I do not see how that case can be satisfactorily distinguished from the present—[His Lordship alluded to the facts of that case.]—Knight Bruce, V. C., there observes:—“It must be remembered also that it is only under the right of the specialty creditors that the simple contract creditors seek to affect the descended estate by standing in the place of specialty creditors paid out of the personal estate. The amount of the personal estate, the mode and time of its application, and the amount and circumstances of the specialty debts, are not in proof upon the present occasion; but there does seem reason to believe that the testator's personal estate is entitled to the benefit of the mortgage vested in Mr. Wood. Upon the whole, considering all the special circumstances of the case, I am of opinion, entertaining the view which I do of the nature and capabilities of the first suit, that I must hold the present plaintiff, though merely a simple contract creditor, not precluded by length of time. I must therefore give him the usual decree against Mr. Oliver, including a direction for marshalling as to the descended estates, and the benefit of the former proceedings, so far as they took place in Mrs. Marsh's lifetime.”

The case of *Busby v. Seymour* (*b*) was referred to as adverse to that proposition; but upon referring to the dates of the facts in that case, it cannot be considered as conflicting with *Vickers v. Oliver*. The debtor Thomas Seymour died in 1821; a bill was filed as against the personal estate in 1823, and the bill was not filed as against the real estate until 1843; and at that period even a specialty creditor would have been barred by lapse of time. Sir E. Sugden speaks with some hesitation as to *Vickers v. Oliver*; but upon considering the grounds on which the right of marshalling stands, *vis.*, the substitution of the simple contract creditors for the specialty creditors, *Vickers v. Oliver* was, I think, rightly decided.

Whether that point is open after what has occurred in the Court of Exchequer may be a question; it was reserved by the first decree and not afterwards; but irrespectively of this, it appears to me that the case must rest on the doctrine acted on in *Vickers v. Oliver*,

(*a*) 1 Y. & C., C. C. 211.

(*b*) 1 Jo. & Lat. 527.

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this bill being founded on the right of the simple contract creditor to stand in the place of the specialty creditors.

I pass from that to the next question, on which every possible argument was urged. The decision of the Court of Exchequer, as reported in the 1st vol. of the *Irish Jurist*, p. 27, would appear to be that the point of time when the right of marshalling is to be determined is the time of the payment by the executor; implying, that if at that time he had personal assets sufficient for payment of the debts, the simple contract creditor could not afterwards come against the real estate by reason of a deficiency, and by the devastavit of the executor.

It is, on the other hand, contended that there is not any such distinction, and that the time at which the right of marshalling is to be determined is irrespective of the state of the assets at the time of the payment by the executor, or of the death of the testator, and that taking the right of the simple contract creditor to be according to the general doctrine, he is entitled to come on the real estate for any portion of the personal estate exhausted in the payment of specialty debts, and to stand *pro tanto* in the place of the specialty creditors, no matter what may have become of the personal estate in the interval between the death of the testator and the time when the Court is called upon to adjudicate.

It is very singular that from the first introduction of marshalling into Courts of Equity there is not any decision or decree to that effect, and there does not seem to be any decision making the simple contract creditor's right to depend upon the question whether or not the executor wasted the personal assets.

The general decree is, that if any part of the specialty debts have exhausted the personal estate, the simple contract creditor is entitled to stand in the place of the specialty creditor. But I cannot find any trace of a decision making that right to depend on the question whether or not the executor had at any given time assets enough to pay all? The general rule is laid down without qualification in the text-books. I find, for instance, the rule thus stated in *Roper on Legacies*, p. 456, ed. of 1804:—"With this view the Court has laid down a rule, that when a creditor has the option of resorting to both

the real and personal assets for a satisfaction of his debt, and a legatee has the power only of resorting to the latter for payment of his demand, if there be a deficiency of the personal assets to pay both of them, the Court will so marshal or arrange the different estates as to confine the creditor to the real, if sufficient, for a satisfaction of his debt, in order that the personal estate may be left disencumbered to answer the demand of the legatee ; or in case such creditor shall have received payment of his debt out of the personal assets, then the Court, upon proper application, will permit the legatee to stand in the place of the creditor to receive satisfaction out of the real estate to the amount of what such creditor was paid out of the personal fund." That is the rule as to legacies ; the rule as to creditors is the same. It was contended, however, that there is authority for the modification of the general rule, and for this proposition a passage in the judgment of Lord Clare, in *Kearnan v. Fitzsimon* (a), was relied on, where he says :—" The rule of marshalling assets holds only where it is proper to be done at the death of the party whose assets are to be marshalled ; it can never arise upon any subsequent fact or accident. And it is clear that if the appellant had proceeded in the year 1766 to enforce satisfaction of the covenant in the marriage articles of his father against the personal estate of Laurence Tallon, there was then a fund in existence out of which it might and would have been satisfied. And if the appellant thought fit to lie by during the life of his father, and to suffer him to dissipate the fund, he cannot now be entitled upon that ground to charge the real estate of Thomas Fitzsimon with satisfaction of the covenant by calling on a Court of Equity so to marshal his assets as to enable him to stand in the place of the judgment creditors who have exhausted the personal estate."

The rule, as thus laid down by Lord Clare, is said to embrace this case—namely, that where the executor, having had in his hands personal assets sufficient to pay all the creditors, pays the specialty debts, and wastes the residue of the personality, the simple contract creditor has no right to call upon a Court of Equity to marshal the assets ; but the facts of *Kearnan v. Fitzsimon* fall short of estab-

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(a) 3 Ridg. P. C. 1, 16.

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lishing that proposition ; and Lord Clare based his decision upon the ground of fraud on the part of the plaintiff, not merely upon the simple circumstance of a *devastavit* by the executor. The demand of the plaintiff in that suit was against a trustee for a breach of trust, and consequently for a simple contract debt. That breach of trust consisted in the non-enforcement by the trustee of performance of a covenant by Laurence Tallon, contained in certain articles executed on the marriage of the plaintiff's father, and under which the plaintiff preferred his claim. The trustee had died in 1750, thirty-four years previously to the filing of the bill in the year 1784 ; the plaintiff had attained his full age in the year 1766. His father continued in possession of the personal estate of Laurence Tallon (against which the claim ought to have been enforced) from the year 1766 down to 1783, when he died. Lord Clare said :—“ Certainly his (the plaintiff's) right to the principal sums comprised in the articles did not accrue until his father's death. But he had a clear right to have had the articles executed so far as the covenant of Laurence Tallon went, and to have had his personal estate (principally consisting of terms for years) applied in satisfaction of it ; and it seems to be a *fraud* on the part of the appellant (the plaintiff) to have lain by whilst the proper fund existed for satisfaction of the covenant, and to have suffered his father to continue in the undisturbed possession of Laurence Tallon's personal estate from 1766 to 1783 ; and after his death indirectly to make the respondent (the real and personal representative of the trustee) answerable for it by charging a breach of trust against Thomas Fitzsimon (the trustee) in not having done an act which was fully competent to the appellant to have done for himself, and which he omitted to do whilst the personal estate of Laurence Tallon was in existence.” That case cannot therefore be considered as an authority for the proposition in support of which it was cited ; and I do not know of any decision which proceeded upon that proposition.

The contrary proposition would to some extent appear to be recognised in *Pollexfen v. Moore* (a). Thomas Moore purchased an estate from Pollexfen, but died before he had paid the whole of

(a) 3 Atk. 272.

the purchase money, having by his will bequeathed a legacy to his sister Mary, and devised the purchased estate and all his personalty to Kemp, his executor, who committed a devastavit of the personalty, and died leaving Boyle Kemp his son and heir-at-law, upon whom the purchased estate descended. Pollexfen filed a bill against the representatives of the real and personal estate of Moore and Kemp for the residue of the purchase money. Mary Moore filed a cross bill, praying that, if the residue of the purchase money should be paid to Pollexfen out of the personal estate of Moore and Kemp, she might stand in his place and be considered as having a lien upon the purchased estate for her legacy. Lord Hardwicke is reported as admitting the lien of Pollexfen, the vendor, upon the estate sold, and as saying:—"But this equity will not extend to a third person, but is only confined to the vendor and vendee; and if the vendor should exhaust the personal assets of Moore and Kemp, the defendant (Mary Moore) will not be entitled to stand in his place, and to come upon the purchased estate in the possession of Kemp's heir. But then the heir of Kemp shall not avail himself of the injustice of his father, who has wasted the assets of Moore, which should have been applied in paying the defendant's legacy. Therefore the estate, which has descended from Kemp, the executor of Moore, upon Boyle Kemp, comes to him liable to the same equity as it would have been against the father, who has misapplied the personal estate; and in order to relieve Mary Moore, I will direct Pollexfen to take his satisfaction upon the purchased estate, because he has an equitable lien both upon the real and personal estate, and will leave this last fund open that Mary Moore, who can at most be considered only as a simple contract creditor, may have a chance of being paid out of the personal assets." That case is confusedly reported, and the judgment of Lord Hardwicke appears at variance with the decree actually made, which is to be found in Mr. *Sanders's Notes*, and in *Sir Edward Sugden's Treatise on Vendors*, 11th ed., p. 873, *et seq.* The decree was, "that the residue of the purchase money and the interest thereof ought, in the *first place*, to be paid out of the personal estate of the said Thomas Moore." It then directed an account of Thomas Moore's personal estate, come

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to the hands of Kemp and his administrator, and the administratrix *de bonis non* of Moore, and that what of Moore's personal estate should appear to have come to the hands of Kemp should be answered out of his personal estate in a course of administration; and in case it should appear that Moore did not leave assets to pay what should be so due for the residue of the purchase money, *and all his other debts, legacies and funeral expenses*; or if such personal estate of Moore was not *now* sufficient to pay the same by reason that the assets of Kemp were not sufficient to answer such part thereof as came to his hands, it was declared that such deficiency, \**so far as the personal estate of the said Thomas Moore shall be applied in payment of the said purchase money*, ought to be made good out of the purchased estate. Upon that decree Sir Edward Sugden observes (p. 874):—“Now in this case Lord Hardwicke, in giving judgment, clearly agreed with the decision in *Coppin v. Coppin* (a), that this equity did not extend to a third person. According to the judgment, his Lordship deviated from that rule in the case before him on the ground of fraud. But Lord Hardwicke's decree cannot be satisfactorily accounted for on this narrow ground. The decree was, that if Thomas Moore (the original purchaser) did not leave assets to pay the residue of the purchase money, *and all his debts, funeral expenses and legacies*, then the purchased estate and the personal estate should be marshalled so as to let in the simple contract creditors and legatees. This could not be on account of the fraud in Kemp, the devisee and executor. It appears by the Registrar's book that Pollexfen had not delivered the title deeds and conveyance of the estate to the purchaser, but had by agreement kept them in his own custody as a security for the purchase money unpaid; and he strongly insisted by his bill that he never intended the deeds to have operation until all the money was paid (b). And this, it is apprehended, must have been the ground on which the decree was pronounced. The seller

(a) Sel. Cha. Ca. 28; S. C. 2 P. Wms. 291.

(b) 1 Reg. Lib. B. 1745, fol. 283.

The words in italics are omitted by Mr. *Sanders*, but are to be found in the *Treatise on Vendors*, p. 874.

had an equitable mortgage on the estate, and the case therefore came within the general rule as to marshalling.\* Thus explained, the case of *Pollexfen v. Moore* does not in the least clash with *Coppin v. Coppin*, but appears to establish an important distinction on this subject, viz., that where the purchaser has an equitable mortgage on the estate, or in case of fraud, the purchased estate and the personal estate may be marshalled in favour of simple contract creditors and legatees." That case of *Pollexfen v. Moore* cannot, strictly speaking, be considered as a very clear authority on the subject; but it goes to this extent at all events, and appears to be so understood by Sir Edward Sugden, that the doctrine of marshalling is recognised in it, although it was a case of *devastavit* by the executor.

The only other case touching upon that doctrine is *Lawrence v. Blake* (a); I have examined the printed cases which were before the House of Lords. It was the case of a demand by a simple contract creditor against the estate of Mr. Blake in respect of a breach of trust. A *devastavit* had been committed by the executor, but he had paid a large sum in discharge of interest upon specialty debts; and the decree of this Court gave relief against the real estate in relation to the assets so paid, to the simple contract creditor, notwithstanding the *devastavit*. The question did not arise there directly; because on looking to the papers it appears that the personal estate fell far short of the demand upon it; therefore, whatever might have been done with the personal estate, there would have been a clear right in the simple contract creditors to marshal the assets, and that too, although the whole personal estate might have been properly applied. But the point discussed in the present case was suggested by Counsel in argument as founded upon *Kearnan v. Fitzsimon*, referring to which it was observed:—"That case was decided in the Irish House of Lords in 1793, and the rule thus laid

(a) 8 Cl. & Fin. 504, 536, 537.

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\* *Luthins v. Leigh* (For. 53); *Aldrich v. Cooper* (8 Ves. 397); *Holdsworth v. Holdsworth* (Hil. 23, G. 3, on appeal from Rolls), and *O'Neal v. Mead* (1 P. Wms. 693, and the cases in the note).

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down has ever since been acted on. Under no circumstances whatever can the real estate be called on for the payment of debts while there are assets of the personal estate; and here there is not even an allegation of insufficiency of personal assets." That position was contravened by Counsel on the other side:—"The right to marshal the assets arises as soon as a portion of the personal estate has been applied to pay that for which the real estate is liable. If that is not so, every form adopted in the English Courts of Chancery is erroneous." The Court, however, did not give any opinion upon that question. Lord Cottenham says:—"This decree is stated to be a principal subject of complaint; but the effect of it is merely to restore to the personal estate sums which had been paid out of that estate in relief of the real estate; there being simple contract creditors who had no other fund but the personal assets to resort to, and the debts altogether far exceeding the amount of the personality, it was objected that this declaration charged the real estate whether settled, devised or descended. It is clear that it did not do so," &c. He does not state affirmatively that the question of marshalling was to be affected by the fact of the misapplication of funds by the executor.

These were the only cases in which the question seems to have been mooted; and one would think that if a point of this kind were maintainable, it would have been noted in some text-book or report; but I do not anywhere find the doctrine of marshalling qualified by any allusion to a devastavit by the executor either prior or subsequent to a payment of a portion of the assets in discharge of specialty debts. I apprehend that if there were now a fund of personal estate forthcoming, there being this claim upon it by a simple contract creditor, and a claim upon it by a specialty creditor, the Court would order the specialty creditor to take his remedy against the real estate, and so to leave the personal fund for the simple contract creditor, and that this should be done although there had been originally a much larger sum in the hands of the executors than was wanting for the purposes of the personal estate. If there were any such principle as that contended for by the defendants, the decrees in cases of this nature, which are of frequent occurrence,

could not be made in the ordinary form without some allusion to the fact of the executor having wasted the assets. In default of cases directly in point, it is difficult to find any which are even analogous. *Prowse v. Abingdon* (*a*) was referred to as containing a *dictum* of Lord Hardwicke, that the rule of marshalling assets could not be affected by any fact which occurred subsequently to the death of the testator. But that case does not touch the present question, because the accident to which Lord Hardwicke alluded was the death of the legatee before he attained twenty-one, by which accident the legacy ceased to be chargeable on the real estate as one of two funds. The case of *Marsh v. Evans* (*b*) may be considered as slightly bearing upon the question. There a testator, having two sons and a daughter, bequeathed to each £2000, payable at twenty-one, with a proviso, that if his assets should fall short for the payment of those legacies, still the daughter should be paid her full legacy, and that the abatement should be borne proportionably out of the sons' legacies only. The executrix wasted the assets, and by those means only there happened a deficiency. Lord Chancellor Parker, reversing the decree of the Master of the Rolls, held that the abatement should be made out of the sons' legacies only. His Lordship observed:—"Suppose the estate had after the testator's death fallen short by a loss by fire, or by a bad title on which money had been lent, neither of which could have been foreseen by the testator, surely both those accidents would come within the provision of the will." That appears to afford some authority for saying that the rights of parties in such cases are not dependent on the question whether there has or has not been a *devastavit* of the executor.

It has been remarked that the simple contract creditors could have filed their bill for the purpose of enforcing their claim against the personality when there was enough to meet their demands; but at the same time it may be also remarked that the parties entitled to the real estate might have done the same thing and insisted upon the proper application of the personal estate. The loss is one occasioned by the common depositary of the fund.

The opinion of the Court of Exchequer does not seem to have

(*a*) 1 Atk. 482, 486.

(*b*) 1 P. Wms. 668.

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*Chancery.*  
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*Judgment.*

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been acquiesced in by Baron Lefroy; for, commenting on *Kearnan v. Fitzsimon*, he says:—"The true criterion whether the simple contract creditor shall have a right to marshal is not the state of the funds at the testator's death, but whether there were funds at any time? In *Aldrich v. Cooper* (a) Lord Eldon lays down the rule to be, 'whether the specialty creditors have exhausted the personal assets.' If the criterion were the state of the assets at the testator's death, the rule would not be stated to be generally applicable to the case of an abstraction by one creditor to the injury of another."\*

Now here the funds became insufficient to pay the simple contract debts when they were wasted by the executor.

Finding no authority for the proposition contended for, I must come to the conclusion that the conduct of the executor does not deprive the simple contract creditor of his right against the real estate with regard to any portion of the personal estate which has been applied by the executor in liquidation of the specialty debts. On these grounds I think that the plaintiff is entitled to the relief which she seeks, and I feel bound to concur in the view taken of the authorities by Baron Lefroy; the consequence of that will be that the fund will be left open for the plaintiff and the Commissioners of Charitable Donations, and they are not affected by the Statute of Limitations.

The opinion which I have expressed on this point in the case renders it unnecessary that I should say any thing as to the effect of the provision in the will of Austen Cooper upon the mortgage.

The last decree of the Court of Exchequer must be varied according to this declaration.

1 *Reg. Lib. Gen. fol.* 9, 117, 128.

2 *Reg. Lib. Gen. fol.* 32, 111.

• (a) 8 Ves. 388.

\* The LORD CHANCELLOR read this passage from the judgment of Lefroy, B., as reported in the *Irish Jurist*, vol. 1, p. 30. See, however, that valuable judgment as given *supra*, p. 382, and printed from the learned Baron's M.S.

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Rolls.

## DENNY v. THE DUKE OF DEVONSHIRE.

(In the Rolls.)

April 30.  
May 6.

A PETITION was presented on the 19th of November 1842 by Henry Denny, Joshua William Strangman, John Power and William Power, against the Duke of Devonshire, the Bishop of Cashel, and the Rev. G. K. Roche, under the provisions of the 1 & 2 Vic. c. 109, s. 16, praying for an order allowing the exemption of the lands of Ballyvoile from tithe rentcharge, and that the certificate and applotment of the tithe composition might be amended.

An order was made on the 14th of June 1843, referring it to the Master to inquire and report whether the lands of Ballyvoile, in the petition mentioned, would have been rightly charged with tithe composition, if the 1 & 2 Vic. c. 109 had not been made, or if such composition had not been suspended. This order was revived by an order of the 19th of February 1845.

The petitioner's charge, filed under the said order of reference, stated that the lands of Ballyvoile were formerly part of the possessions of the greater monastery of Dunbrody, in the county of Wexford, and were held by the Friars and Abbots free from tithes. That the said lands were concealed from the King's Commissioners when the possessions of the monasteries were confiscated, and that under a commission, issued in the 18th Eliz., an inquisition was held, and the jury found that one hundred and forty acres of land, arable and pasture, in Ballyvoile, with the tithes and spiritualities of the same, of the annual value of 13s. 4d., was parcel of the possessions of the late house and abbey of Dunbrody, and had been concealed from the said Lady the Queen and her progenitors.

The charge then stated letters patent of the 8th of March, 19th Eliz., granting one hundred and fifty acres of land, arable and pasture, lying and being in Ballyvoile, and the tithes of the same,

Where lands were not formerly in the possession of the dissolved monasteries, unity of possession of the lands and tithe will not extinguish the tithe. Therefore where the petitioner derived title under a lease for lives renewable for ever of lands, and the tithes thereof, made in 1700, the Court refused to declare the lands tithe free (on a petition presented under the 1 & 2 Vic. c. 109, s. 16), though no tithe had been paid since 1700, there being no proof that the lands were Abbey lands, and no notice of the proceedings having been given to the reversioner.

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*Rolls.*  
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Statement

described as parcel of the possessions of the late monastery of Dunbrody, to George Moore, in trust for Sir Nicholas Walsh. That Robert Walsh, the grandson of Sir Nicholas, by indenture of lease of the 13th of May 1700, demised the town and lands of Ballyvoile, therein described as containing, by common estimation, one plough-land, &c., together with all the tithes great and small, and other duties and rights to said tithes belonging, for three lives, with a covenant for perpetual renewal. That all the estate of the lessee became vested in his grandson William Power, who, on the 24th of February 1781, conveyed to Robert Snow and his heirs the said town and lands of Ballyvoile, with the tithes thereof, for the lives in the original lease and a renewal thereof, dated the 24th of September 1726, and the lives to be named in every future renewal. The charge then traced the title, under the lease of 1700, to the petitioners, and the title to the reversion in fee to one Charles Edward Kennedy, who was not a party in the matter, and had no notice of the petition. It then stated a composition made on the 8th of August 1833, and a certificate of the Commissioner, certifying the composition of the parish of Stradbally (£47 of which was assessed on Ballyvoile), that it was payable partly to the respondent the Duke of Devonshire, as lay impropriator, and partly to the Rev. J. Devereux, the vicar of the parish of Stradbally, and that for a period of sixty years before the establishment of the said composition, the lands of Ballyvoile were held by the respective owners thereof, and by their several tenants, without payment or render of tithes.

The respondents' discharge denied that the lands of Ballyvoile were formerly part of the possessions of the monastery of Dunbrody; but insisted that even admitting the statement in the charge to be true, it only led to the conclusion that one hundred and forty acres of the lands of Ballyvoile were so held.

No evidence was given of the lands of Ballyvoile, or any part of them having been in the possession of the monastery, except an attested copy of the inquisition stated in the charge. The Master by his report, bearing date the 9th of April 1851, found that he had, in the presence of the Counsel and solicitors concerned for the petitioners, and the respondent the Duke of Devonshire,

inquired into the matter referred to him, and upon reading the charge of the petitioners, by which it appeared that they themselves set forth a title by which they claimed to be owners of the said lands of Ballyvoile, and of the tithes, both great and small, thereof, in the said orders and petition mentioned, and that they derived said lands of Ballyvoile, together with the tithes thereof, both great and small, for three lives, with a covenant for perpetual renewal, he found that the said lands would have been rightfully charged with tithe composition, if the Act of the 1 & 2 Vic. c. 109 had not been made, or if such tithe composition had not been suspended.

The petitioners objected that the Master ought to have reported that the said lands of Ballyvoile would not have been rightfully charged with tithe composition if the 1 & 2 Vic. c. 109 had not been made, or if such composition had not been suspended.

**Mr. Christian** and **Mr. Harris**, in support of the objection.

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*Argument.*

**Mr. Napier** and **Mr. Joshua Clarke**, for the respondent.

*Salkeld v. Johnston* (a), *Fellows v. Clay* (b), *Sheil v. Incorporated Society* (c), were incidentally referred to.

**The MASTER OF THE ROLLS.**

An order was made in this matter by the late Master of the Rolls, bearing date the 14th of June 1843 (which order was renewed on the 20th of February 1845), whereby it was referred to the Master (under the provisions of the 16th section of the 1 & 2 Vic. c. 109) to inquire and report whether the lands of Ballyvoile, in the petition mentioned, would have been rightfully charged with tithe composition if the Act of the 1 & 2 Vic. c. 109, had not been made, or if such composition had not been suspended.

The Master has made his report under the said order on the 8th of April 1851, whereby he has found that he had, in the presence of the solicitors for the Duke of Devonshire, the Bishop of Cashel, and the

May 6.  
*Judgment.*

(a) 1 M'N. & G. 242.

(b) 4 Q. B. R. 313.

(c) 10 Ir. Eq. Rep. 411.

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Rev. G. T. Roche, the respondents in this matter, inquired into the matters so to him referred, and he states in his report that it appears from the charge of the petitioners that they themselves set forth a title by which they claim to be owners of the said lands of Ballyvoile, and of the tithes, both great and small, thereof, in the said order and petition mentioned, and that they have derived the said lands of Ballyvoile, together with the tithes thereof, both great and small, for three lives, with a covenant for perpetual renewal; and he finds "that said lands of Ballyvoile in the petition mentioned would have been rightfully charged with tithe composition, if the Act 1 & 2 Vic. c. 109 had not been made, or if such composition had not been suspended."

An objection has been taken by the petitioners to this report, that the Master ought to have reported that the said lands of Ballyvoile, in the petition mentioned, would not have been rightly charged with tithe composition, if the Act of the 1 & 2 Vic. c. 109 had not been made, or if such composition had not been suspended.

It appears by the charge of the petitioners that by lease, bearing date on the 13th of May 1700, one Robert Walsh demised to one William Power the town and lands of Ballyvoile, containing by common estimation one ploughland, be the same more or less, "together with all the tithes, both great and small, and the duties and rights to said tithes belonging," situate in the barony of Decies, and county of Waterford, to hold to the said William Power and his heirs, for three lives, with covenant for perpetual renewal on payment of certain renewal fines.

On the 24th of February 1781, William Power the younger, the grandson of the lessee, in whom the estate and interest in said lease of 1700 had become vested, by indenture of that date, demised to Robert Snow and his heirs the said town and lands of Ballyvoile, with the tithes thereof, for the lives in the last renewal of the lease of 1700, and for all lives to be named in every future renewal of the said lease of 1700.

The estate and interest in the lease of 1700, and in the several renewals thereof, have become vested in the petitioners Henry Denny, Joshua William Strangman, and John Power; and the estate and

Interest in the lease of 1781 have become vested in the petitioner William Power. The estate and interest in the reversion in fee of Robert Walsh, the lessor in the lease of 1700, has become vested in Charles Edward Kennedy, Esq., who has had no notice whatever of the proceedings before the Master, or of this motion; and I am called upon by the petitioners, who claim by virtue of the lease of 1700, and the renewals thereof, to hold under him the lands of Ballyvoile (which lands were demised, "together with all the tithes, both great and small, and the duties and rights to said tithes belonging"), to decide in his absence that the lessor in the lease of 1700 had no title to demise the tithes, and that the lands were "tithe free or not rightfully charged with, or otherwise not subject to, tithe composition, or the applotment thereof."

The 16th section of the 1 & 2 Vic. c. 109, after reciting that, forasmuch as the rentcharges, made payable by the said Act, are charged upon the lands heretofore subject to the payment of compositions for tithes, it is expedient to make provisions for the more cheap and convenient determination of the liability to such compositions, enacts that "Where any person having any interest in any lands, whereon any such composition shall have been apportioned, shall dispute the liability of such lands thereto, by reason of such land having been tithe free, or not rightfully charged with, or otherwise not subject to such tithe compositions, or the applotment thereof, it shall be lawful for the Court of Chancery or Exchequer in Ireland, upon the petition of any such person, in a summary way, to make such order, allowing or disallowing such claim of exemption, or to direct such feigned issue or reference to the Master of the Court, or the Chief or Second Remembrancer, or other proceeding, as such Court shall think proper, for the purpose of ascertaining whether such lands would have been rightfully charged with tithe composition if this Act had not been made, or if such composition had not been suspended; and if it shall appear to the Court that such land would not have been rightly charged with such composition, it shall be lawful for the said Court so to declare, and to make such order for the amendment of the certificate and applotment of such composition, and of the entry of such certificate in the registry of the

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diocese as to such Court may seem fit ; and such lands shall be exonerated from rentcharge, or such rentcharge reduced accordingly."

There was no evidence before me, and none that I am aware of before the Master, to show that the particular portion of Ballyvoile, which is said to be tithe free, had ever been in possession of any of the dissolved monasteries. The non-payment of the tithes for the last century and a-half has arisen from the circumstance that the same person has been, during that period, the owner of the lands and also the owner of the tithes. The question is, what is the legal consequence of that state of things? There are several authorities on that subject collected in *Eagle on Tithes*, vol. 1, p. 26. The result of them is there stated thus:—"Tithes are properly said to be collateral to the land in respect of which they are payable ; for they do not belong to, nor are they appurtenant to, the land ; but they are an inheritance quite distinct from the estate of the land ; they are issuing out of the land as the rent is, or common, but they are not to be taken off the profits of the land. For this reason no unity of possession of the land and the tithes can either extinguish or suspend them in point of right, but they remain *in esse* notwithstanding the unity. Thus, if a person purchase a manor within his rectory, it is true that, by this purchase and unity of possession, the manor, which was titheable before, is made *de facto* untitheable, because the parson cannot pay tithes to himself ; but if the parson afterwards make a lease of his rectory, then the parson himself shall pay the tithes of his manor to the lessee of the rectory. So if the parson had made a feoffment of the manor, tithes would be payable by the feoffee to the person infeoffing." And in vol. 2, p. 261 :—"The discharge, by unity of the possession, of the parsonage and the land titheable, in the hands of the same person or body, is said to have been unknown to the Common Law, and to have been created by the statute of 31 Hen. 8, c. 13. For such union, although it occasioned a suspension of the payment of tithes, because a man cannot pay tithes to himself, yet it did not, of itself, operate as an extinguishment of the tithes at the Common Law ; for the tithes, being merely collateral to the land, still remained *in esse*, notwith-

standing the union; and, if the land and the right to tithes had been separated, tithes would have been payable for the land. But, by force of the clause of discharge in the the statute of 31 *Hen.* 8, if the monastery, at the time of the dissolution, were seised of the rectory and of the lands, discharged from the payment of tithes *simul et semel*, the lands shall be for ever exempted from the payment of tithes, although the lands and the rectory should be in the hands of different persons."

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The effect of that clause of the statute of *Hen.* 8 was, that where lands had been held by the monasteries, and the same parties were owners of the lands and of the tithe, although at Common Law that circumstance did not extinguish the tithe, yet under the statute of *Hen.* 8 the lands became tithe free. But in the present case it is not shown that the lands were Abbey lands, or lands belonging to any monastery. The petitioner's title-deed is an actual recognition that the tithes existed in the year 1700.

The only respondents before the Court on this occasion are the Duke of Devonshire, the Bishop of Cashel and the Rev. Mr. Roche. His Grace's Counsel insist that he is entitled to the tithe rentcharge. There is, no doubt, considerable difficulty in the way of the Duke of Devonshire; but I am not called on to offer any opinion on the subject of his rights. If he were to bring an action at law for the tithe rentcharge, it might perhaps be relied on as a defence that there has been no payment for thirty years and more, either to the Duke of Devonshire, or to any person under whom he derives. On the other hand, it might be contended, on the part of the Duke, that the certificate of composition, which states that the tithe composition is payable to his Grace, would in such action be binding on the petitioners, neither they or Charles Edward Kennedy having appealed to the Privy Council: *Ash v. Locke; O'Leary on Tithe Rentcharge*, p. 175.

I am, however, not called upon to offer any opinion upon those questions.

The petitioners require me to decide that the lands of Ballyvoile were not liable to tithe composition, by reason of such lands being tithe free, or not rightfully charged with, or otherwise not subject

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to, such tithe composition or the appplotment thereof, without any notice whatever in the Master's office or here to Charles Edward Kennedy, in whom the reversion in fee in the lands and tithes, demised by the lease of 1700, is now vested, although the lessor in that lease, under whom he derives, expressly demised the tithes, both great and small, to the person under whom the petitioners derive.

Suppose the rent fell in arrear, and an ejectment for non-payment of rent was brought by the reversioner, and an *habere* was executed, I do not understand how the non-payment of tithes, for one hundred and fifty years, could affect the right of the reversioner to recover what has been demised—viz., the land and the tithes.

The 20th section of the 1 & 2 Vic. c. 109, enacts that the provisions thereinbefore contained “with respect to the establishment of claims of, or for, any *modus* or exemption from, or discharge of, tithes, shall not extend to any case where the tithes of any land shall have been demised, by deed, for any term of life or number of years, or where any composition for tithes shall have been made, by deed or writing, by the person or body corporate entitled to such tithes, with the owner or occupier of the land, for any such term or number of years, and such demise or composition shall be subsisting at the time of the passing of this Act, nor to any suit for establishing a claim to tithes now pending.”

In a Court of Equity, where the same person is to pay and to receive payment, it is considered to have been made : *Burrell v. Lord Egremont* (a).

The decision of the Master appears to me to be in conformity with the authorities referred to in *Eagle on Tithes*, and with the statute. If unity of ownership does not extinguish the tithe, what authority have I to expunge these lands from the appplotment? If the question was merely between the petitioner and the Duke of Devonshire, I might consider whether I should not direct the petition to stand over, in order that the Duke of Devonshire might bring an action at law. But the objection to that course is, that if the Duke of Devonshire were to fail in the action, the matter would

(a) 9 Beav. 237.

rest as it is. The Duke's right might be concluded, but the reversioner's would not. He might say that his ancestor or predecessor demised these lands and the tithes,—that the tithes exist at this moment as a separate inheritance, although they have not been paid. The rent might not be paid, and the reversioner might recover the lands and tithes. What right has the Court, under such circumstances and without notice to the reversioner, to strike the lands out of the appplotment-book as being tithe free?

This case and some others, which have lately come before me, show that there ought to be some reform in the course of proceeding in the Masters' offices. The order of reference was made in this matter in 1843. The only question in the case was a short question of law, which the Master might have disposed of at one, or, at the utmost, two meetings, if it had been brought before him. The pendency of the case of *Salkeld v. Johnston* was no reason for postponing the case, as the question in the present case is entirely different.

The objection to the report must be overruled, with costs.

It has been stated that there is a receiver over the lands. If so, the petitioners may, if they think right, object before the Master, under the 152nd General Order, to the payment by the receiver of the tithe rentcharge to the Duke of Devonshire, in which case his Grace would, I presume, be required to establish his right by an action. The present course of proceeding, which disregards altogether the rights of Charles Edward Kennedy, appears to have been ill advised.

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In the Matter of the Act 11 & 12 Vic. c. 61, and the Trusts  
 of the Will of HENRY ANDREWS.

April 24, 25.  
 May 28.

By a deed of separation, reciting that the wife was entitled to certain specified property, and that no provision had been secured to her on the marriage, nor had any part of the property, to which she so became entitled, been limited to the use of the issue (if any) of the marriage, and that the husband had agreed to relinquish, for a certain period, the premises, which were the property to which he became entitled in right of his marriage, and formed a provision far exceeding that reserved to him for his own support, they covenanted to live separate, and that all the wearing apparel, &c., and all other estate and effects, real or personal, to which the wife should, by purchase, gift, devise, or bequest, in her favour, &c., during the coverture, become entitled, should be and remain to her separate use; and it was agreed that the wife might dispose of such property as if sole, and the trustees were empowered to use the name of the husband in order to recover any money, &c., which should thereafter be due to the husband in right of the wife. The recited property was then made the subject of settlement. The wife at the time was entitled to a reversionary life interest in a fund, after the death of her mother, who was then alive, which was not referred to in the deed, and afterwards came into possession by the mother's death.—*Held*, that, on the construction of the deed, that she, and not her husband, in his marital right, was entitled to the latter fund.

Mr. Francis Fitzgerald and Mr. Exham, in support of the objections.

Mr. Francis Fitzgerald and Mr. Exham, in support of the objections.

that all the wearing apparel, &c., and all other estate and effects, real or personal, to which the wife should, by purchase, gift, devise, or bequest, in her favour, &c., during the coverture, become entitled, should be and remain to her separate use; and it was agreed that the wife might dispose of such property as if sole, and the trustees were empowered to use the name of the husband in order to recover any money, &c., which should thereafter be due to the husband in right of the wife. The recited property was then made the subject of settlement. The wife at the time was entitled to a reversionary life interest in a fund, after the death of her mother, who was then alive, which was not referred to in the deed, and afterwards came into possession by the mother's death.—*Held*, that, on the construction of the deed, that she, and not her husband, in his marital right, was entitled to the latter fund.

Mr. Serjeant *Christian* and Mr. *David Boyle*, contra.  
*Graffley v. Humfage* (a), *James v. Durant* (b), *Blythe v. Granville* (c), *Hoare v. Hornby* (d), *Manning v. Chambers* (e), were cited.

1851.  
*Rolls.*  
*In re*  
ANDREWS.

The MASTER OF THE ROLLS.

In this case a motion has been made that the report of the Master in this matter may be varied in the particulars specified in the objections taken to the report.

May 28.  
Judgment.

On the 9th of February 1850, an order was made whereby it was referred to the Master to inquire and report who is, or are, the parties entitled, and in what manner and proportions, to the sum of £3922. 0s. 8d., Government £3½ per cent. stock, and £231. 7s. 11d. cash, standing to the credit of this matter.

The Master has made his report on the 5th of February 1851, whereby he has found, amongst other matters, that Henry Andrews being at the time of the making of his will, and of his decease, possessed of, or entitled to, personal estate of considerable value, duly made and executed his will, bearing date the 16th of October 1837, whereby, after bequeathing certain legacies, and directing payment of his debts, he directed that the trustees of his will should stand and be possessed of the residuary trust funds, and the interest and dividends thereof, upon trust to pay the interest or dividends thereof to the testator's sister, Mary Andrews, for life, and after her decease in trust to pay the interest or dividends of one equal third part or share thereof to the testator's niece, Anne Andrews, during her life, and after her death to hold said one-third share in trust for her issue, as in said will mentioned; and as to the remaining two-thirds of said residuary trust fund, upon trust, after the death of said Mary Andrews, to pay the interest and dividends of same unto the testator's niece, Ellen Hennis, the petitioner in this matter, then Ellen Andrews, and to her assigns during her life, and after the decease of the said Ellen, to hold the said two-third parts in trust for the issue of the said Ellen, as in said will stated.

(a) 1 Beav. 46.

(b) 2 Beav. 177.

(c) 13 Sim. 190.

(d) 2 Y. & Col. C. C. 128.

(e) 11 Jur. 466.

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The testator Henry Andrews died on the 2nd of April 1838, and the said Mary Andrews proved the will. The said Mary Andrews, Anne Andrews, and Ellen Hennis, survived the testator. Ellen Hennis and Anne Andrews have both attained their age, and Ellen Hennis, after she attained her age, married, on or about the 18th of May 1839, Robert Hennis. No settlement was executed on such marriage, and differences having arisen between the said Ellen Hennis and her husband, it was mutually agreed between them that they should live separate and apart, and a certain deed of separation was duly executed, bearing date the 26th of August 1841, between the said Robert Hennis of the first part, said Ellen Hennis of the second part, and certain other parties of the third, fourth and fifth parts; and upon the construction of that deed of separation the question arises.

The report, after setting out some of the provisions of that deed, to which and to others contained therein I shall hereafter advert, finds that there never has been any child of the marriage, and further finds that the said Mary Andrews died on the 6th of March 1848, and that, upon her death, the residue of the testator's personal estate became distributable pursuant to the trusts of the said will, and that the said Anne Andrews is entitled to be paid the interest and dividends on one-third part thereof for her natural life; and then follows a finding in the following words, which is the finding which the petitioner Ellen Hennis complains of:—"And that, notwithstanding the said deed of separation, the said Robert Hennis, on the death of the said Mary Andrews, became, was and now is, in his marital right, entitled to be paid the interest and dividends of the said two-thirds of the residue of testator's personal estate, and that the said Robert Hennis and Anne Andrews are respectively entitled to be paid such interest and dividends, in the proportions aforesaid, from the 6th of March 1848, the day of the death of the said Mary Andrews, and also the future interest and dividends which shall accrue on same, from time to time, during the respective lives of said Ellen Hennis and Anne Andrews."

The report then finds that Anne Andrews and Robert Hennis are, in the respective shares aforesaid, entitled to the residue of

said cash after certain payments to Anne Lymberry and Gustavus Bowbetter (upon which latter payments no question arises).

By the objections taken to the report on the part of Ellen Hennis it is insisted that the Master should not have found that Robert Hennis, on the death of Mary Andrews, became and was entitled, in his marital right, to be paid the interest and dividends of the two-thirds of the residue of the testator's personal estate, or the two-thirds of the cash which represents the interest and dividends already accrued; but that he should have found Ellen Hennis, under and by virtue of the deed of separation, entitled to such dividends and interest; and the decision upon the question thus raised depends on the construction to be put on the deed of separation.

The deed of separation, which bears date the 26th of August 1841, after reciting the title of said Ellen Hennis to a leasehold interest in the lands of Ballygibbon, in the county of Cork, and also her right to a certain sum of £1000, late currency, after the death of her mother, and also reciting that, under the residuary clause in the will of her father Thomas Andrews, she was entitled to the sum of £600 or thereabouts; and reciting that, on the marriage of said Ellen Hennis with said Robert Hennis, there was not any provision secured to the said Ellen Hennis, nor had any part of the property to which she so "became entitled," as hereinafter recited, been in any manner limited to the use of the issue, if any, of their marriage, and reciting that great and unhappy differences had arisen, and did then subsist, between them the said Robert and Ellen, and that they had agreed to live separate and apart, and reciting that Robert Hennis is willing and hath agreed to relinquish and give up to the said Ellen Hennis, for her natural life, and for a further limitation, to take effect on the decease of the survivor (she taking upon herself the expense of any child which may be born), all that and those the said lands of Ballygibbon, and the said sum of £1000, late currency, and the sum of £450 sterling, being the residue of the personal estate of the said Thomas Andrews, deceased, after deducting thereout a sum of £150 or thereabouts, paid by said Robert Hennis for the particular use of said Ellen, and thereby agreed to be allowed

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him, "which said several premises are the property to which the said Robert Hennis *became entitled* in right of his marriage with said Ellen Hennis, otherwise Andrews, and form a provision far exceeding that reserved to him for his own support and maintenance."

The said indenture then witnessed that, in pursuance of said agreement, they covenant to live separate and apart, &c. &c.; "and also that the wearing apparel and other chattels which, previously to the execution of these presents, have been delivered up to be placed in the possession of the said Ellen Hennis otherwise Andrews, and also all other estate and effects whatsoever, real or personal, to which the said Ellen Hennis otherwise Andrews shall by purchase, gift, devise or bequest in her favour, or by representation, or by any business which she may carry on, or by savings out of her separate income and estate, or by any other means, or in any other manner, during her present coverture, become entitled, shall be and remain to and for the sole and separate use of the said Ellen Hennis otherwise Andrews."

There then follows a clause, authorising Ellen Hennis to dispose of such property, by deed or will, as if she were sole and unmarried; and that it should be lawful for the trustees in the deed, for the benefit of Ellen Hennis, "to use the name of said Robert Hennis (either alone or jointly with the name of the said Ellen Hennis, but without any costs, &c., to said Robert Hennis), in any action or suit which it may become necessary or convenient for her to institute or prosecute against any person or persons whomsoever, for the recovery of any money, debts, goods, chattels, estate or effects which shall hereafter be due, or shall belong to or be owing to the said Robert Hennis in right of the said Ellen, she the said Ellen taking upon herself the charges and expense of maintaining and educating, out of her separate estate, any child or children that may be born of the said marriage."

The property which is expressly referred to in the deed is then made the subject of settlement, in pursuance of said recitals; but there is no reference in the deed to the interest and dividends of the two-thirds of the residuary estate of Henry Andrews, who died on

the 2nd of April 1838, which the said Henry Andrews had bequeathed to said Ellen Hennis, from and after the death of her mother, Mary Andrews. Mary Andrews, however, lived for about six years and a-half after the date of the deed of separation.

I am unable to concur in the construction which the Master has put on the deed of separation.

He appears to have considered that the interest and dividends of the two-thirds of the reidueary property of the testator, Henry Andrews, was not bound by the clause in the deed of separation to which I have referred, on the ground that Ellen Hennis had, previously to said deed, which bears date in August 1841, "become entitled" to such interest on the death of Henry Andrews in 1838, although she was only entitled to said interest in the event of her surviving Mary Andrews, to whom the same had been bequeathed for her life.

In considering the meaning of the words "all other estate and effects whatsoever, real or personal, to which the said Ellen Hennis shall by purchase, &c., or by any other means, or in any other manner, become entitled," it is proper to look to other parts of the same instrument to ascertain the sense in which the same words are used.

In one of the early recitals in the deed, to which I have already referred, after reciting the title of Ellen Hennis to the lands of Ballygibbon, to the £1000 late currency, and to the £600 residue of her father's property, it is stated that there was not any provision made for her on her marriage, nor had any part of the property, to which she so "became entitled," been in any manner limited, &c. : and in another part of the deed, prior to that on which the question arises, after distinctly referring to the said lands, the said sum of £1000, and the said residue of £600, these words follow:—"Which said several premises are the property to which the said Robert Hennis became entitled in right of his marriage with said Ellen Hennis," &c.

You thus have the property distinctly recited which Ellen Hennis, or Robert, in her right had (so far as the parties to the deed considered) *become entitled*. When therefore it is to be considered, in construing the clause in question, what is the meaning of the words

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to which she shall by any other means, or in any other manner, "become entitled," it was, in my opinion, intended to include property not previously recited, and to which she should become entitled to the beneficial enjoyment of. No doubt, in one sense, she was entitled at the date of the deed of separation to the interest and dividends of the two-thirds of the residuary property of Henry Andrews, subject to the life interest of Mary Andrews, and in law the right was vested; but, popularly speaking, her right was contingent on her surviving Mary Andrews, as Ellen Hennis was only entitled for her life, and would never have derived any beneficial interest in the bequest had Mary Andrews survived her. The parties to the deed of separation, therefore, naturally contrasted the property to which she had previously become entitled, and which is expressly set out in the deed, with the property in which she had then acquired no beneficial interest; and having described in express terms certain property as that to which she or her husband in her right had become entitled at the date of the deed, and omitted to refer to the subject-matter now in dispute, the subsequent clause and the words "shall become entitled" in said clause appear to me to include that which, it appears from the previous portion of the deed, the parties thereto did not consider that she had then become entitled to.

It is also to be observed that the clause empowering the trustees, on behalf of Ellen Hennis, to use Robert Hennis's name, would expressly, by its language, include the right to sue for the dividends and interest, now claimed by Robert Hennis in direct opposition to such clause.

The case of *Graffley v. Humfage* (a), which the petitioner's Counsel referred to, does not, I think, apply. That was the case of a marriage settlement, and the intended husband covenanted to settle any property which the intended wife, or he in her right, should thereafter, during the coverture, succeed to the possession of, or acquire, on certain trusts in the settlement mentioned. At the time of the marriage the wife was entitled to a sum of money not mentioned in the settlement. It was held that the money was bound by the husband's covenant, but the decision was on the ground that, by

(a) 1 Beav. 46.

the marriage, the husband became entitled in his marital right, and therefore the fund came expressly within the covenant, being property which he, in right of the wife, became, by and during the coverture, entitled to.

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The same observations apply to *James v. Durant* (a).

The case, however, of *Blythe v. Granville* (b) bears strongly on the question in this case. There, by a marriage settlement, £1500 and £2700 stock, of which the lady was possessed, were settled in trust for her separate use for life, remainder in trust for her intended husband for life; and after his death, as the wife should appoint by will; and the intended husband covenanted that, if the marriage should take effect, he would, as often as occasion should require, join with his wife in doing all necessary acts for assigning to the trustees all the property to which his wife should become entitled during the coverture, upon the trusts declared of the £1500 and £2700 stock. At the date of the settlement the wife had an absolute vested interest in £1935 stock, expectant on her father's death, but it was not mentioned in the settlement. During the marriage the husband became bankrupt, and then the wife's father died; it was held that the £1935 stock did not belong to the husband's assignees as part of his estate, but was bound by his covenant as being property to which the wife would become entitled during the coverture. The Vice-Chancellor, in the course of the argument, said:—"The words 'become entitled' mean become entitled either in possession or in reversion."

In giving judgment he said:—"I have no doubt upon the question in this case. It is plain what the parties to the settlement meant to do; they meant to deal with all the wife's property that was in a tangible shape at the time, by making an immediate settlement of it upon the trusts which we find in the deed; and they meant that all her property should be settled in like manner, when it should be in a tangible shape. And without referring to the recitals in the deed, my opinion is, that the words of the husband's covenant do, *proprio vigore*, bind all the wife's other property, in the shape in which it then was. Under the deed of 1815 the wife had a reversionary interest in the sum of £1935, reduced annuities; and by the

(a) 2 Beav. 177.

(b) 13 Sim. 190.

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settlement the husband covenanted that, in case the then intended marriage should take effect, he, his heirs, executors or administrators, would join with the said Catherine Downes from time to time, as often as occasion should require, in making, doing and executing all such acts, deeds, conveyances, assignments, matters and things as should be necessary or requisite for effectually conveying, assigning and transferring to the said Samuel Downes and Charles Downes, their heirs, executors and administrators, all the property, of what nature or kind soever, to which she the said Catherine Downes should, *during her said intended coverture, become entitled*, in order that the same might be fully and effectually vested in them the said Samuel Downes and Charles Downes, their heirs, executors, administrators and assigns, upon the trusts, and to and for the intents and purposes thereinafter expressed and declared of and concerning the same. The covenant, therefore, plainly applies to that property which the wife would become entitled to as soon as the coverture took effect. The coverture was the futurity referred to; and immediately on the marriage taking place the wife became entitled to the property during the coverture."

That case is sought to be distinguished from the present, on the ground that the question arose on the construction of a marriage settlement, and not a deed of separation, and no doubt the latter words of the judgment I have read are inapplicable to the present case. At the same time, I consider the case an important authority to show that the words "become entitled" may reasonably be considered applicable to property to which the wife may become entitled, either in possession or reversion, and there is, in my opinion, strong ground for so construing the words in the present case.

In the case of *Hoare v. Hornby* (a), the property not included in the settlement was vested in possession, at the time of the settlement, although the wife had not, at the time of the settlement, the actual possession of the property.

Upon the whole, I think that the construction put by the Master on the deed of separation is not correct, and the objections to the report must be allowed.

(a) 2 Y. & Col. C. C. 128.

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## WHITE v. ANDERSON.

(*Chancery.*)

March 9, 11.

**JOHN WILLIAM ANDERSON**, of Ashfield, in the year 1823, being seised of a freehold estate in the lands of Boherboy, entered into a treaty of marriage with Cornelia Maziere, widow of Henry Maziere, and daughter of Bernard Shaw (then deceased).

By indenture of settlement, bearing date the 2nd of December 1823, made between John W. Anderson of the first part, Cornelia Maziere of the second part, Peter Maziere (father of Henry Maziere then deceased) of the third part, Robert Shaw (afterwards Sir Robert Shaw, Bart.) and Samuel White (who were trustees of the settle-

In an ante-nuptial settlement conferring considerable benefits upon the husband in the property of the wife, to which it chiefly related, which settlement contained a recital that it was made by the wife "in consideration of the

marriage and of the provision thereafter made and provided for her by the husband," he covenanted "that whatever estates and property, whether real or personal, and wherever situate, or either or both, should in the event of his decease, if the wife should survive him, be charged and chargeable with, and subject to, the payment of an annuity or yearly rentcharge of £250, to be paid and payable to her and her assigns during so many years as she should live, besides and in addition to the provision hereby made and intended for her."

With the exception of a contingent reversionary interest in a policy of assurance for £3000 on the life of the husband, which policy was subject to a debt of £2000 and interest thereon at £4 per cent., there was not any provision made out of his property for her beside the annuity of £250. At the period of the marriage he was engaged in trade, and was seised of real estate; subsequently he acquired other real estate, and afterwards became a bankrupt. Held, that the annuity of £250 was well charged both upon the real estate of which he was seised at the marriage, and upon the real estate which he subsequently acquired.

The draft of the above settlement did not contain the covenant as to the annuity of £250, but on the draft was indorsed a memorandum, in the handwriting of the husband, stating that the solicitor, who prepared that draft, "had omitted to insert a clause subjecting whatever property he (the husband) might die possessed of to a yearly rentcharge of £250 for the benefit of his intended wife during her life, exclusive of such other advantage as she might be entitled to by the foregoing deed." On the death of the husband a bill was filed (by a party claiming under a mortgage of both estates, and of a date prior to the settlement) praying that the covenant might be reformed in conformity with the memorandum. The widow in her answer resisted the reformation, and denied that it ever was her understanding of the marriage contract that the operation of the covenant was to be limited to such property only as the husband might die possessed of. The parol evidence of three trustees of the settlement was to the same effect; one of them deposed that to him, both at and after the marriage, the husband had stated his intention that the estates which he then possessed, or should thereafter acquire, should be subject to the annuity of £250. Held, that the bill should be dismissed, without costs, and that a declaration should be inserted in the decree that the annuity was well charged upon the estates of which the husband was seised both at and after the marriage.

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ment executed on the marriage of Henry Maziere and Cornelia Maziere) of the fourth part, and Sir James Caleb Anderson, Bart., and Alexander Boyle of the fifth part, reciting the intended marriage, and that John W. Anderson was entitled to a policy of assurance for £3000 upon his own life, he assigned the same to Sir James Anderson and Boyle upon the trusts after mentioned. This settlement also recited that Cornelia Maziere was entitled to a policy of assurance on her own life for £2000, and to an annuity of £200 per annum during her life under articles of the 31st of January 1817, executed on her former marriage, to secure which annuity Peter Maziere had by those articles covenanted with Messrs. Shaw and White to pay to them £4000, to be by them invested in £5 per cent. stock, whereof the dividends were to be applied in payment of the annuity; as a further security for which Peter Maziere had also covenanted to execute his bond for £8000, conditioned for payment of the annuity of £200; and that he did execute the same, and paid £2000 only (part of the sum of £4000), which sum of £2000 the trustees invested in £5 per cent. stock, afterwards reduced to £4 per cent., and now produced a principal sum of £2031. And also recited that Cornelia Maziere was entitled to certain leasehold tenements in the city of Cork, and to a legacy of £1000, charged by the will of her father upon the lands of Monkstown. And by this settlement it was witnessed that "Cornelia Maziere, in consideration of the said intended marriage, and of the provision thereafter made and provided for her by the said John William Anderson," assigned the leasehold tenements, the £1000 legacy, the £2031 stock, the £8000 bond, and the annuity of £200 (in assigning of which stock, bond and annuity Peter Maziere, Robert Shaw and Samuel White joined), to Sir James Anderson and Alexander Boyle, upon trust as to the leasehold premises for John William Anderson for so many years of the term therein as he should live, with remainder in trust for Cornelia Maziere for so many years of the term as she should live, with remainder upon certain trusts for the children of the marriage; and as to the annuity of £200, upon trust, subject, as thereafter stated, to pay same to Cornelia Maziere (notwithstanding her being a married woman) for so many years as

she and John W. Anderson should jointly live, and after his death, to her and her assigns ; and as to the £2031 stock, and the £8000 bond, to hold same as a security for the £200 annuity for the life of Cornelia Anderson, subject as thereafter mentioned, and to apply the dividends of the stock in payment of the annuity, and on her death to transfer the stock and assign over the bond to Peter Maziere, his executors or administrators ; and as to the sum of £1000, upon trust for John William Anderson, his executors, administrators and assigns absolutely.

The deed also recited that John William Anderson, having proposed to borrow the sum of £2031 stock, with a loan, to extend his business, such loan to be secured by the bond of J. W. Anderson, conditioned for payment of £2079, with interest at £4 per cent., to Sir J. Anderson and Boyle, upon the death of Cornelia Maziere or John William Anderson, whichever should first happen ; "and by way of inducement to obtain the consent of Peter Maziere to the said loan," Cornelia Maziere assigned the policy of £2000 on her life to Peter Maziere upon subsequently declared trusts ; and as a further security, it was agreed by John William Anderson that Sir James Anderson and Boyle should stand possessed of the £3000 policy upon the life of J. W. Anderson, in trust, in case he should die before his intended wife, to invest out of the proceeds of that policy a sum of £2079 in purchase of £4 per cent. stock, whereof the dividends should be applied in payment of the annuity of £200 to Cornelia Maziere during her life, and after her death to pay £2079 to Peter Maziere in discharge of the bond, or at the option of Peter Maziere, to pay him that sum at the death of J. William Anderson, he (Peter Maziere) securing the annuity of £200 to Cornelia Maziere during her life to the satisfaction of the trustees. As to the residue of the proceeds of the policy of £3000, upon trust to pay the same to Cornelia Maziere. The deed also contained a proviso that if she should die in the lifetime of her husband, whereby (under subsequently contained stipulations) Peter Maziere would become entitled to the £2000 policy upon her life in discharge of the bond of J. W. Anderson, and if the proceeds of that policy should fall short of the sum due on foot of the bond, such

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deficiency should be supplied out of the £3000 policy. In case John W. Anderson should survive his wife, the trustees were, after his decease, to invest the £3000 upon trusts subsequently declared. And as to the £2000 policy on the life of Cornelia Maziere, it was declared that Peter Maziere should hold the same upon trust, on her decease in the lifetime of John William Anderson, to call in the amount and apply it in payment of his bond for £2079; but in case she should survive him, upon trust to assign the policy of £2000 to her absolutely. And the further trusts of the £2000 policy, in case John William Anderson should survive his wife, were for the children of the marriage, and in default of such children, for John William Anderson absolutely. Then followed a covenant by Peter Maziere to pay the annuity of £200, and a proviso that he might enter into possession of the rents and profits of the leasehold premises in the city of Cork, and apply them in payment of the premiums upon the two policies of assurance, and of £4 per cent. interest upon the bond of John William Anderson. After the usual trustee clauses, and a declaration that the annuity of £200, covenanted to be paid by Peter Maziere, was the same as that settled by him on Cornelia Maziere upon her former marriage, the settlement contained the following covenant, upon which the questions in the present case principally turned:—"And the said John William Anderson doth hereby for himself, his heirs, executors, administrators and assigns, covenant, promise and declare, with and to the said Sir James Caleb Anderson and Alexander Boyle, their and each of their executors, administrators and assigns, that whatever estates and property, whether real or personal, and wherever situate, or either or both, shall, in the event of the decease of the said John William Anderson, in case the said Cornelia shall survive him, be charged and chargeable with and subject to the payment of one annuity or yearly sum of £250, to be paid and payable to the said Cornelia and her assigns during so many years as she shall live, besides and in addition to the provision hereby made and intended for her." Then followed a covenant by John William Anderson, Peter Maziere, Robert Shaw, and Samuel White, for further assurance.

The foregoing settlement was duly executed by John William Anderson and Cornelia Maziere in the presence of two witnesses in Cork, and was afterwards similarly executed by Peter Maziere and all the other parties in Dublin.

Subsequently to the execution of the settlement, but before the marriage took place, a memorandum was added to it, stating that Peter Maziere, in paying the £200 annuity, was to be allowed credit for the interest on the above mentioned sum of £2079, lent to John William Anderson. This memorandum was signed by Cornelia Maziere and John William Anderson in Cork previously to the marriage.

The above settlement was duly registered in Dublin on the 16th of January 1824. The marriage was solemnized on the 16th of December 1823.

John William Anderson having, subsequently to his marriage, acquired by purchase the lands of East and West Grange, by indenture bearing date the 27th of September 1832, in consideration of a sum of £1403, then due by him to Peter Maziere, mortgaged those lands to Peter Maziere.

By indenture of the 25th of January 1836, John Wm. Anderson, in consideration of £797 then advanced, further mortgaged to Peter Maziere the lands of East and West Grange, and also mortgaged to him the lands of Boherboy.

Peter Maziere, on the 5th of June 1837, filed a bill against John William Anderson and others, praying a foreclosure and sale on foot of those mortgages.

Before any of the defendants had answered the bill, John William Anderson was declared a bankrupt, and Robert Baylor was appointed his assignee, against whom the suit was revived by bill on the 29th of December 1837. After the defendants had answered both bills, but before the hearing, Peter Maziere died on the 3rd of February 1839. His administrator (Henry White) revived the suit against the defendants, and on the 4th of March 1840 obtained a decree to account. On the 6th of October 1840, John W. Anderson died, leaving Cornelia Anderson, his widow, surviving him.

The Master having made his report, a final decree for foreclosure

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and sale, both of East and West Grange and Boherboy, was pronounced on the 3rd of June 1843.

On the 6th of June 1845 the lands of Boherboy were set up and sold under that decree to Robert Briscoe for £1125. He objected to the title on the ground (*inter alia*) that those lands, although not named in the settlement of 1823, were liable, under the covenant of John W. Anderson therein contained, to the annuity of £250. That objection having been referred to the Master, he reported that John W. Anderson was, at the time of the execution of the settlement, seised or possessed of Boherboy for a term of three lives renewable for ever, and that he was then a trader, subject to the Bankruptcy Laws; and that it appeared to be a question of great doubt whether, according to the true construction of the covenant, John W. Anderson did not thereby expressly charge all the real estates of which he, at the period of the execution of the settlement, was seised, including Boherboy, with the annuity of £250 per annum in case his wife should survive him, or whether he only thereby charged all such real estate as he should die seised of; and accordingly the Master found that a good title could not be made to the lands under the decree of the 3rd of June 1843.

Exceptions taken by the plaintiff Henry White to this report were overruled on the 2nd of December 1846 by the Master of the Rolls, and Robert Briscoe was discharged from his purchase. The case, as before his Honour, will be found reported as *White v. Baylor*, in the 10th volume of the *Irish Equity Reports*, p. 43. That decision was, on appeal, affirmed by the LORD CHANCELLOR.

On the 19th of October 1848, the plaintiff filed a bill of revivor and supplement against Thomas Tangney, appointed assignee of John William Anderson instead of Robert Baylor, who had died, and also against the personal representative of another deceased party. To that bill Cornelia Anderson, who had not been a party to any of the former proceedings in the cause, was also made a defendant. The bill having alluded to the previous proceedings in the cause, submitted that such property only as John William Anderson should die possessed of was subject to the annuity of £250, and charged that he did not die possessed either of Boherboy, or East or West Grange, and

that no claim had been put forward by Cornelia Anderson since his death in respect of the annuity until after the investigation of the title to Boherboy, but that now she insisted on being entitled to it. The bill also stated that the plaintiff had lately found "the original draft of the settlement of 1823, as the same was submitted by the late John Terry, who was the solicitor of Henry Maziere (the former husband of Cornelia Anderson), and of Cornelia Anderson herself at the time of her second marriage, to John William Anderson for his approval, and that it appears the same did not at first contain the said covenant in question, and that there appears a memorandum or note, by way of observation, or instructions, written in pencil on a blank page of the end of the said draft, in the handwriting of the said John William Anderson, in the words and figures following:— 'Mr. Terry has omitted to insert a clause subjecting whatever property Mr. Anderson may die possessed of to a yearly rentcharge of £250 for the benefit of Mrs. H. Maziere during her life, exclusive of such other advantage as she may be entitled to by the foregoing deed.' That the covenant in question appears to have been thereupon introduced in the handwriting of John Terry, but by some mistake on his part the covenant, as framed and inserted by him, does not express as distinctly as it might, and in pursuance of the memorandum or instrument ought to have done, that the rentcharge should only affect such property as John William Anderson should die possessed of." The bill then averred, "that it was the intention of the parties to the said settlement that the said covenant should only affect such property as John William Anderson should die seised or possessed of," and prayed a declaration of the Court that the covenant did affect such property only, or if necessary, that the settlement and covenant should be reformed in accordance with, and be made conformable to, the instructions given by John William Anderson to John Terry as contained in the pencil memorandum, and to the intentions of the parties to the settlement, by limiting the charge of £250 per annum to the lands and property of which John William Anderson should die possessed; and also prayed a revivor as against the parties to the suit other than Cornelia Anderson.

Cornelia Anderson, by her answer, insisted that according to the

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true construction of the covenant all the property, both real and personal, of John William Anderson, as well as subsequently to his marriage, was rendered liable to the annuity of £250 per annum ; and she resisted the reformation of the settlement in accordance with the pencil memorandum on the draft, which, although she believed to be in the handwriting of John William Anderson, yet she positively denied that it formed the basis of the arrangement between the parties to the settlement with regard to the annuity of £250, or that such memorandum ever was submitted to her, or to any of the four trustees, or her other friends, and that neither she or they assented, or ever would have assented to its terms, and that it did not contain the final intentions even of John William Anderson himself, who had often told her that all his property, real and personal, at or since his marriage, was liable to the annuity of £250. She also stated that John William Anderson was a person of business-like habits, and had read over the settlement previously to executing it. She also alleged that a duplicate of the settlement had been at the same time executed, and that she believed it to coincide exactly with the original, and that neither of those documents were in her possession. She also stated her belief that her first husband Henry Maziere never had any solicitor, and asserted that John Terry was the solicitor of Peter Maziere, and was employed by him to prepare the settlement ; that Peter Maziere acted on that occasion towards her *in loco parentis* ; that she was then led by him, and all the other parties to the settlement, to believe that the annuity was charged upon all the property, both present and future, of John William Anderson, and that it was the duty of Peter Maziere to cause it to be so secured, and that it would be inequitable that he, or any person deriving under him, should be permitted to take advantage of any informality or ambiguity in the settlement occasioned by his neglect, and she relied on his having notice of the settlement.

On the part of the plaintiff it was proved that the draft of the settlement was found amongst the papers of John Terry (who was dead) ; that the body of the draft was in the handwriting of one of his clerks, and several interlineations and alterations, including the covenant in question, were in the handwriting of John Terry, and

that the pencil memorandum at the end of the draft was in the handwriting of John William Anderson. Mr. Sainthill, one of the plaintiff's witnesses, proved that John Terry acted on the occasion of the preparation of the marriage settlement as attorney for Peter Maziere. The plaintiff produced the settlement.

On the part of the defendant Cornelia Anderson it was proved that at the time of the treaty of marriage with John William Anderson she was a young person of about twenty-three years of age; that her father and mother were both dead, and that she resided with Peter Maziere and his wife, and that Peter Maziere alone on her part gave instructions for the preparation of the Settlement, which was drawn with unusual care, and that (as appeared by the bill of costs of Terry) very eminent Counsel, William Waggett, Esq., then Recorder of Cork, had been five times consulted on the subject, and that the draft was frequently altered. It also appeared by the bill of costs that a duplicate of the settlement was executed, and proof was given that such duplicate was not to be found amongst the papers or muniments of Cornelia Anderson, or of John William Anderson, or either of his assignees, and that it was not in the possession of any of the four trustees. One of the entries in the bill of costs was, "After three skins of this draft had been engrossed, in consequence of a letter received from Mr. Maziere, the draft was sent to him to Dublin for his perusal and amendment, and on being returned, so many additional covenants and matters were to be added as considerably to lengthen the draft." Counsel appeared to have had the draft before him twice afterwards. It was proved that Mr. Terry was the solicitor, and Mr. Waggett the Counsel usually consulted by Peter Maziere. The following letter from Peter Maziere to John William Anderson, dated from Dublin on the 6th of December 1823:—"The deeds came into my hands yesterday, and I lost no time in perusing them. I regret to find that there was a very material matter to myself entirely omitted. I instantly wrote to John Terry pointing out this error, and observing at same time, it may be unnecessary.\* If he should say so, I will be satisfied, and I think, if necessary, my friend Terry omitted

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it in his hurry to expedite the business. However, I left one of the deeds with Mr. Shaw, jun. (afterwards Sir Robert Shaw), for his perusal, but he wished to show it to his law-agent for his approval.

I think, except the omission I mentioned to Terry, all the other parts are right and satisfactory. I am sorry for the short delay that may now happen, but you will allow that it is better all parties should be satisfied in such a business than, when executed, it should occasion any unpleasant feelings afterwards. I met Sir J. C. Anderson this day, and agreeable to his wish, I have left the second deed with him for his perusal."

It appeared from the bill of costs that in consequence of this letter, the memorandum (by which it was stipulated that credit for the interest on the sum of £2079 should be allowed to Peter Maziere in payment of the £200 annuity) was indorsed on both parts of the settlement.

The evidence of the four trustees, with respect to the £250 annuity, was as follows:—Sir Robert Shaw deposed—"There was, as I at the time understood, and do believe, an agreement by or on behalf of John William Anderson, during the treaty respecting his marriage with Cornelia Anderson, that he should settle upon or secure to her a jointure, but in what amount exactly I do not now recollect; and that jointure was secured on his property generally, as I then understood and do believe, as an equivalent for the property or money then brought to him by her."—Here the property of Mrs. Anderson, included in the settlement, was specified by the witness, who also stated that Mrs. Anderson then also had a sum of about £700, in ready money; he then continued thus:—"I, however, certainly considered at the time that such jointure was *bona fide*, and that same was secured upon whatever property the said John William Anderson was then possessed of, but I am quite unable to specify the nature or particulars of that property."

Mr. White, in his deposition, stated that he had not any recollection whatsoever of the contents or existence of the settlement.

Mr. Boyle's deposition was:—"I have a general recollection that during the negotiation respecting the marriage it was intended, and

an arrangement was entered into, or made on the part of John W. Anderson, that he should secure to the said Cornelia a jointure on (as I best recollect and believe) his property generally; but my recollection on the subject is not very accurate, and I am quite unable to set forth the amount, or to specify the nature, of the property he charged, or meant to charge."

Sir James C. Anderson deposed as follows:—"On the negotiation for the marriage there was an agreement entered into by John W. Anderson that he should secure to Cornelia Anderson a jointure of £250 out of whatever property, whether real or personal, he was then possessed of, or might at any time afterwards become possessed of."

Sir James Anderson also stated that he had advised his brother John W. Anderson so to secure the jointure, and that he (Sir J. A.) understood from John W. Anderson at the time of the marriage that he intended to charge the jointure upon the estate known as the Fermoy Race-course (Boherboy), and that he afterwards, upon purchasing East and West Grange, had told him (the witness) that he considered it to be liable to the jointure.

Evidence was also given of applications made shortly after the death of John W. Anderson by Cornelia Anderson in respect of the £250 annuity to Mr. Boyle and to her brother, but that they, in consequence of the very embarrassed state in which Mr. Anderson had left his affairs, and of the smallness of her income, discouraged her from seeking to enforce her claim by resort to litigation.

**Mr. Brewster, Mr. Francis Fitzgerald and Mr. J. H. Orpen,** for the plaintiff.

The covenant, even as it now stands in the settlement, according to its natural construction, should be held to charge the annuity of £250 upon such real and personal property only as Mr. Anderson died seised or possessed of. Had there been any intention at the date of the settlement to create a charge *in praesenti*, the lands of Boherboy, of which Mr. Anderson was then seised, would have been named. In *Ennis v. Smith* (a) a covenant, nearly similar to that

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here, was restricted in its operation to the property of the covenantor left at his death after payment of his debts. So in *Kirkham v. Needham* (*a*), the husband, previously to marriage, settled part of his real estates, and covenanted that he would, by will or otherwise, give, devise and bequeath all other his real estates, and also all his personal estate and effects whatsoever, to his children. It was held that this applied only to such real and personal property as he should be possessed of at his death, and that he might therefore, without breach of the covenant, sell an estate which he was seised of at the marriage, but which was not included in the settlement. A like interpretation was put upon marriage articles in *M'Donnell v. M'Donnell* (*b*). The word "whatever" is a referential phrase—something is to be predicated of it—it can be rationally explained only by applying it to property left at the death of Mr. Anderson—an event expressly pointed at by the words "in the event of the decease of the said John W. Anderson," which words are unnecessarily introduced, if not for the purpose of limiting the covenant to the property, of which he may then be in possession. Were this not so, the words "in case the said Cornelia shall survive him," which are also to be found in the covenant, would alone have been sufficient. It would have been most imprudent for a person engaged in trade to enter into such a covenant as for the defendant it is here contended that this is; *prima facie* the inference must be, that he would leave his property unfettered. The cases of *Lewis v. Madocks* (*c*), and *Randall v. Willis* (*d*), which will be cited on the other side, are not consistent with each other; in the one case the specific lands purchased were decreed to belong to the wife, in the other to the heir.

Secondly—It is manifest that there is an omission in this covenant; and should the Court be of opinion that the words which ought to be supplied are not sufficiently indicated by the context, it ought to exercise in this case its unquestionable jurisdiction in the reformation of deeds. The handwriting of Mr. Anderson himself in the pencil memorandum, limiting the covenant to such property

(*a*) 3 B. & Ald. 531.(*b*) 4 Dru. & War. 376.(*c*) 8 Ves. 150; S. C. 17 Ves. 48.(*d*) 5 Ves. 262.

as he should die possessed of, is the best possible evidence of what this covenant was intended to be ; and it is plain that Mr. Terry made a mistake in drawing up the covenant as it now stands. In *Jenkins v. Quinchant* (*a*), a settlement was reformed in favour of the issue against the devisees of the husband (claiming under the reversion) by the husband's letter of instructions for drawing the settlement. The Lord Chancellor there says :—“It is said I ought not to take this as the only instructions ; but I think it does not appear that there were any other instructions, and it is admitted that the settlement was made in consequence of this letter.” In *Barstow v. Kilvington* (*b*), a marriage settlement was, against the heir of the mother (whose the estates had been) claiming the reversion, reformed in favour of the younger children, in accordance with a letter from her, written on the marriage of her daughter twenty-six years after her own marriage. Without casting any imputation of an intentional departure from truth on the answer, or on the parol evidence, the Court, when it looks at the memorandum of Mr. Anderson, may conclude that the defendant and the witnesses examined on her behalf have been under an erroneous impression ; *litera scripta manet*.

The property put in settlement was not exclusively that of Mrs. Anderson. She is given an interest in the surplus of the proceeds of the policy of £3000 belonging to Mr. Anderson. Therefore this covenant is not the only equivalent for her property. The mere prevention of the accrue of the marital right is a valuable consideration.

**Mr. Christian, Mr. Deasy, and Mr. Westropp**, for the defendant  
Cornelia Anderson.

In construing this covenant, the scope of the whole settlement

(*a*) 5 Ves. 596, n.

(*b*) 5 Ves. 593.

**NOTE.**—In addition to the cases cited in the text, *vide*, as to the reformation of documents, *Henkle v. Royal Exchange Assurance Company* (1 Ves. 317); *Baker v. Paine* (1 Ves. 456); *Motteux v. London Assurance Company* (1 Atk. 545); *Alexander v. Crosbie* (Ll. & G. temp. Sug. 145); *Harbidge v. Wogan* (5 Hare, 258); *Pearce v. Verbeke* (2 Beav. 333); *Walsh v. Trevanion* (16 Sim. 178); *Baily v. Lloyd* (5 Russ. 330); *Cole v. Knight* (3 Mod. 277); *Duke of Bedford v. Marquis of Abercorn* (1 Myl. & Cr. 312); *Exeter v. Exeter* (3 Myl. & Cr. 371).

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and the motives of the parties must be considered. The implied object of every marriage settlement is to provide for the wife and children. The parties here were not content with resting upon implication only. In the preamble to the operative part of the settlement it is stated that Mrs. Anderson conveys her property, as mentioned afterwards, "in consideration of the marriage and of the provision thereafter made and provided for her by the said John William Anderson." This is the true key to the settlement. Substantially there was not any provision made by Mr. Anderson for his wife, except the annuity of £250; for it is idle to regard the possible surplus of the proceeds of the policy of £3000 after payment, with interest, of his debt exceeding £2000 to Mr. Maziere, as a provision for Mrs. Anderson, a policy too upon which the premiums were to be paid out of her property. Under the settlement Mr. Anderson derived numerous benefits, viz., an absolute interest in the legacy of £1000 charged on Monkstown, a life interest in the leasehold property in Cork, the subjection of Mrs. Anderson's policy of £2000 to Mr. Anderson's debt to Maziere, and the charging of the leaseholds and of her former jointure with payment of interest upon that debt, and with payment of the premiums upon his policy of £3000; and he became entitled *jure mariti* to a sum of £700 in ready money, as proved by Sir Robert Shaw. To counterpoise all these advantages derived by the husband, it was a fair stipulation on her part to require a covenant charging the annuity of £250 upon whatever property, real or personal, he then or afterwards might possess. It was such a contract as a prudent father ought to have obtained for his daughter; there cannot be any doubt that Mr. Maziere must be considered as placed *in loco parentis* to Mrs. Anderson at the time of her marriage. The construction contended for on the part of the plaintiff, if the true one, would have left the husband an unrestrained power of disposition over his property: *Jones v. Martin* (a); and accordingly have subjected the annuity for the wife to the vicissitudes of trade. Such an arrangement could never have been fairly designated "a provision" for her, and is neither probable or rational. That this Court will struggle with

(a) 5 Ves. 286, n; S. C. 2 Anst. 882.

language in order to support the main intent of marriage settlements is strongly exemplified by *Hope v. Clifden* (*a*), *Woodcock v. Duke of Dorset* (*b*), and cases of that character. That the lands of Boherboy at least are bound by this covenant, is shown by *Falkner v. O'Brien* (*c*), where it was held that a covenant that, notwithstanding any former grant of £1500 charged upon the whole estate of the covenantor, the lands of Blackacre and Whiteacre should stand exonerated therefrom, and that all his other lands and estates should stand charged therewith, created a charge on the lands of which he was then seized or possessed, though not specified by name. Lord Manners there said :—“ This constitutes a clear charge upon all his (the covenantor's) estates, the words being, ‘that all his estates are charged, not that he will charge his estates,’ which distinguishes this case from *Fremoult v. Dedire* (*d*).” So here the words are, “ shall be charged and chargeable with and subject to,” &c., not that “he will charge them.” There were not any subsequently acquired estates in *Falkner v. O'Brien*. Lord Manners did not there decide, or even intimate, an opinion that he would have confined the operation of the covenant to present estates merely. Here there are subsequently acquired estates. There is no restriction in the present case as to the property to which the covenant should apply. The word “whatever” is most comprehensive, and there is nothing tending to limit it to property at the death of the husband; and the words “in the event of the decease of John William Anderson” mark the period at which the enjoyment of the annuity is to commence, and cannot be so strained as to be applied to the property on which it is charged. The phrase “wherever situate” points to more estates than one, and accordingly shows an intention to charge more estates than Boherboy, the only one which he then possessed. *Generalia verba sunt generaliter intelligenda*, and must be taken in their largest sense, unless qualified by some special words: 3 *Inst.* p. 76. To the same effect is the trite maxim, *verba chartarum fortius accipiuntur contra proferentem*. That a covenant professing to bind subsequently acquired property constitutes in equity a

(*a*) 6 *Ves.* 499.

(*b*) 3 *Bro. C. C.* 569.

(*c*) 2 *Ball & B.* 214.

(*d*) 1 *P. Wms.* 429.

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specific lien, is now beyond controversy : *Lyster v. Burroughs* (*a*) ; *Metwalf v. Archbishop of York* (*b*) ; *Lewis v. Madocks* (*c*) ; *Randall v. Willis* (*d*), which two latter cases coincide in the main point, viz., that such a covenant is a specific charge upon the property which it professes to bind. To the same effect are *Tooke v. Hastings* (*e*) ; *Roundell v. Breary* (*f*) ; *Graffey v. Humpage* (*g*) ; *Hankes v. Jones* (*h*) ; *Master v. De Croismar* (*i*) ; *Wellesley v. Wellesley* (*k*) ; *Hardey v. Green* (*l*) ; *Lyde v. Mynn* (*m*), in which latter case the property was only in expectancy, and the covenant held to be unaffected by the bankruptcy of the covenantor, which occurred previously to his acquisition of the property.

The case of *Ennis v. Smith* (*n*), cited on behalf of the plaintiff, is quite inapplicable here, because the settlement there subjected the property to legacies, which plainly showed the intention that the debts should be first paid, and therefore the Court of Exchequer narrowed the application of the covenant to such property as the covenantor died possessed of. In *Ravenshaw v. Hollier* (*o*), a covenant, containing words of minor force to those here, was applied to subsequently acquired estate. The covenantor there was seized of estates in tail and in fee at the time of entering into a covenant to pay an annuity to his daughter out of the rents, profits and annual income of his real and personal estate. Of course upon the estate tail the covenant did not then attach; but he having subsequently suffered a recovery of the hereditaments of which he was seized in tail, that covenant was held a charge upon them, and must have been so held upon the ground that it charged any subsequently acquired estates in fee. The ruling of the Court there as to the covenants to settle an estate of £200 per annum, or

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| ( <i>a</i> ) 1 Dru. & Wal. 142.                                | ( <i>b</i> ) 1 My. & Cr. 547.            |
| ( <i>c</i> ) 8 Ves. 150; S. C. 17 Ves. 48.                     | ( <i>d</i> ) 5 Ves. 262.                 |
| ( <i>e</i> ) 2 Vern. 97.                                       | ( <i>f</i> ) 2 Vern. 482.                |
| ( <i>g</i> ) 1 Beav. 46.                                       | ( <i>h</i> ) 5 Bro. P. C. 136, Toml. ed. |
| ( <i>i</i> ) 11 Beav. 184.                                     | ( <i>k</i> ) 4 Myl. & Cr. 561.           |
| ( <i>l</i> ) 13 Jur. 777, since reported; 12 Beav. 182.        |  |
| ( <i>m</i> ) 1 M. & K. 683.                                    | ( <i>n</i> ) Jo. & Car. Exch. R. 400.    |
| ( <i>o</i> ) 7 Sim. 3, affirmed (on appeal) by Lord Lyndhurst. |  |

£4000 in lieu of it on certain trusts for the benefit of his daughter and her husband and issue, does not affect the ruling as to the covenant to pay the annuity, with reference to which only was the allusion made by the covenantor to the rents, profits and annual income of his real and personal estate. Whether, therefore, the Court is guided by the ancient maxims of the law, or by the train of judicial decisions upon covenants resembling the present, it is bound to adopt the most comprehensive interpretation, and accordingly to hold that all the property of John W. Anderson, from the moment of its acquisition by him, was well charged with the annuity of £250 by the covenant as it now stands.

But secondly, the plaintiff prays the Court to alter this covenant so as to render it consonant with a pencilled memorandum indorsed on the draft of the settlement—a prayer which must have been refused, even if the defendant had wholly refrained from entering into evidence, and simply by her answer denied that she, or those concerned for her, had ever entered into the contract alleged by the plaintiff.

In *Lord Irnham v. Child* (a), in speaking of the reformation of documents on the ground of mistake, Lord Thurlow says:—"That it (mistake) should be proved as much to the satisfaction of the Court as if it were admitted. The difficulty of this is so great, that there is no instance of its prevailing against a party insisting that there was no mistake." Supposing even that Mr. Anderson intended that the covenant should embrace only such property as remained to him at his death after payment of his debts, that was never the intention or belief of the defendant; the pencilled memorandum was written by Mr. Anderson only, and does not appear during the whole progress of the negotiation to have been shown to the defendant or her friends. The question is not *quo animo* Mr. Anderson made the settlement, but *quo animo* the defendant understood and accepted it. As to the great weight to be given to the answer of a defendant in cases like this, the authorities are unanimous. In addition to that of Lord Thurlow, already quoted, there may be mentioned that of Lord Eldon in *Beaumont v. Bradley* (b), where he observes:—

(a) 1 Bro. C. C. 92.

(b) Tur. & Russ. 41.

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"In cases of this nature great weight must be given to what is reasonably and properly sworn on the part of the defendant, because it must be a very strong case that would, even in a recent transaction, operate to overturn or vary a solemn instrument; and after the lapse of so long a time,\* it must be a case that leaves no reasonable doubt—a case that must satisfy the conscience of the Court or of a jury; but it is only after great consideration that such a case should be sent to a jury." In *The Marquess of Townsend v. Stangroom* (*a*), Lord Eldon acted on the same principles, and to those principles Sir Edward Sugden warmly expressed his adherence in *Mortimer v. Shortall* (*b*). Had it even been proved, which it has not, that at one time during the marriage treaty the terms of the memorandum had been accepted by all the parties, there is no date or other evidence to show that it constituted the *final* contract. In *Breadalbane v. Chandos* (*c*), Lord Cottenham observes:—"In order to justify the Court in correcting the settlement, it must be proved not only that the contract was different from that which the settlement carried into effect, but that there was no change of intention by which the circumstance, that the settlement did not follow the terms of the original contract, might be explained." Mr. Justice Story, in his Treatise, says:—"For, as the parties are at liberty to vary the original agreement, if the circumstances of the case lead to the supposition that a new interest has supervened, there can be no just claim for relief on the ground of mistake. The very circumstance that the final instrument of conveyance or settlement differs from the preliminary contract, affords of itself some presumption of an intentional change of purpose or agreement, unless there is some recital in it, or some other attendant circumstance, which demonstrates that it was merely in pursuance of the original contract:" 1 *Eq. Jur.*, s. 160, p. 148, 2nd ed. Here the recitals all are in support of the covenant as it stands in the settlement. The case of *Jenkins v. Quinchant* (*d*), cited for the plaintiff, was a *postnuptial*

(*a*) 6 Ves. 328.(*b*) 2 Dru. & War. 363.(*c*) 2 Myl. & Cr. 739, 740.(*d*) *Ubi sup.*

\* In that case twenty-four years.

settlement, and both in that case and *Barstow v. Kilvington* (a) the reform granted was based upon the letters of the parties against whom it was sought.

In *Bunbury v. Lloyd* (b) the settlement was not consistent with the instructions of the settlor so far as they appeared in evidence ; and the prior and subsequent acts and declarations of the settlor were consistent with the instructions, and inconsistent with the settlement ; but it did not appear what was the final contract of the parties ; yet as it was possible, though not probable, that the settlor might have agreed to make such a settlement as was in fact executed, Sir Edward Sugden refused to relieve on the ground of mistake, and accordingly dismissed the bill. That case is much stronger than the present, because when the parol evidence, given on behalf of the plaintiff, is considered, it is apparent that the acts and declarations of Mr. Anderson are conformable—not to the memorandum—but to the settlement. The evidence of Sir J. Anderson is distinct on this head. His depositions, and those of Mr. Boyle and Sir Robert Shaw, all prove that their understanding of the contract was the reverse of that insisted on by the plaintiff, and show that, if there be any ambiguity in the covenant, it should be reformed, if at all, in favour, not of the plaintiff, but of the defendant. The letter from Dublin of Mr. Maziere (under whom the plaintiff claims) demonstrates his satisfaction with the settlement, which he, being *in loco parentis* to the defendant, was bound to have properly drawn. If it had contained any thing contrary to the intention of Mr. Anderson, he had ample opportunity of detecting it. The covenant was on the last skin of parchment, and therefore actually before his eyes when he executed the settlement. A similar circumstance was by Sir Edward Sugden deemed worthy of notice in *Bunbury v. Lloyd*. Great deliberation was used in preparing the settlement, eminent Counsel having been no less than five times consulted, and frequent amendments seem to have been made in the draft. Under the circumstances, it is impossible for the Court to vary this settlement.

Counsel also mentioned, as cases in which a reformation was

(a) 5 Ves. 593.

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(b) 1 Jo. & Lat. 638.

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**ANDERSON.** refused, *Shelburne v. Inchiquin (a)*, and *Harwood v. Wallis (b)*, in the former of which Lord Thurlow says that the testimony necessary to support a bill for reformation must be "strong and irrefragable."

#### The LORD CHANCELLOR.

*Judgment.* This case is not, upon the whole, free from doubt; but I have not any hesitation in saying that the prayer of the bill, so far as it seeks a reformation of the settlement, cannot be complied with. It prays specifically "that it may be decreed that the covenant of John William Anderson, in the marriage settlement, bearing date the 2nd of December 1823, for providing an annuity of £250 for the defendant Cornelia Anderson, affected such lands and property, real and personal, as the said John William Anderson died seized or possessed of; or if necessary, that the said settlement, and the covenant in that behalf therein contained, may be reformed in accordance with, and be made conformable to, the instructions so given by the said John William Anderson to the said John Terry, as contained in the said memorandum or note written on the draft of said settlement hereinbefore referred to and set forth, and to the intentions of the parties to the said settlement, by limiting the said charge of £250 per annum therein mentioned to such lands and property as the said John William Anderson should die possessed of." So that the Court is called upon to say that this was the construction put upon the covenant not only by Mr. Anderson, but also by all of the parties to the settlement.

There was not any difference of opinion at the Bar as to the grounds upon which a Court of Equity will reform a settlement. One of those grounds is fraud, but it is not pretended that any fraud exists in this case. Another ground is mistake; and that is the basis on which the plaintiff here rests his claim for this special relief. Now with regard to mistake, Lord Thurlow, in *Lord Irnham v. Child (c)*, which was cited for the defendant, says:—"That it should be proved as much to the satisfaction of the Court as if it were

(a) 1 Bro. C. C. 338; and 5 Bro. P. C.

(b) 2 Ves. 195.

(c) 1 Bro. C. C. 92.

admitted. The difficulty of this is so great, that there is no instance of its prevailing against a party insisting that there was no mistake." In the present case the only evidence of instructions so to be called is evidence of instructions given by Mr. Anderson only. That evidence consists of a memorandum written in pencilling on a blank page, at the end of what is said to have been the original draft of the settlement, which memorandum is in the handwriting of Mr. Anderson, and is as follows:—"Mr. Terry has omitted to insert a clause subjecting whatever property Mr. Anderson may die possessed of to a yearly rentcharge of £250 for the benefit of Mrs. H. Maziere during her life, exclusive of such other advantage as she may be entitled to by the foregoing deed." These instructions were given at an intermediate stage of the transaction itself, in fact during the progress of the settlement. They were, I will say, given prior to the insertion of the covenant; and I will further assume that they comprised the then actual intentions of Mr. Anderson himself upon the subject. But there is not a particle of evidence to show that such was the intention of the other parties to the settlement. I find too Mr. Terry acting not simply upon the memorandum itself. And so far from the intention of all the parties to the settlement being similar to that attributed to Mr. Anderson, the parol testimony uniformly tends to prove the reverse to have been the fact. The trustees of the settlement, executed on Mrs. Anderson's first marriage, namely, Sir Robert Shaw and Alexander Boyle, were also parties to the settlement on her marriage with Mr. Anderson; and the impression of both seems to have been quite the contrary of that which the prayer of this bill calls upon me to say it was. Sir Robert Shaw, I observe, states (*inter alia*) that he considered the jointure to have been "*bona fide*." Sir James Anderson, the brother of Mr. Anderson, and one of the trustees of this settlement, has also been examined; his evidence is quite clear as to his own impression with regard to the actual contract between the parties, and he also adds that Mr. Anderson himself, both at and subsequently to the execution of the settlement, had stated to him that he intended to charge the jointure upon all property, real and personal, which he (Mr. A.) then, or subsequently, might possess. It would

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be impossible to disregard the concurrent testimony of all these witnesses. But the case does not rest there, because I find also that the answer of Mrs. Anderson is to the same effect. Nothing can be more clear than her denial; after stating her belief that the pencilled memorandum was in the handwriting of Mr. Anderson, she says "that said pencilled note or memorandum, by whomsoever written, did not form the basis of said settlement or the final contract between the parties thereto, but that it was throughout understood and intended, and expressly stipulated by and between all the parties to the settlement, that in consideration for the considerable advantages derived by said John William Anderson under the settlement, the annuity of £250, provided for this defendant, should be charged upon all the estate, real and personal, of the said John William Anderson, of which, at the date of, or subsequently to, the marriage, he was or should be seised or possessed; and this defendant believes that said pencil observation or note, by whomsoever written, was hastily written, and did not contain the true intent and meaning of the said John William Anderson; and saith that such instructions were never assented to by her, or by any person as she believes on her behalf, nor would this defendant, or any of her friends or trustees, have assented to any such contract or arrangement upon her part."

Now what is there in the present case to countervail that answer? Nothing but the memorandum. In *Mortimer v. Shortall* (a) a lease was rectified against the answer of the defendants; but there was not only the direct evidence of the solicitor who prepared the lease, and the evidence of other witnesses as to the mistake, but there was also evidence on the face of the lease itself, and of certain other documents which established the existence of the mistake. And I find Sir Edward Sugden to have said there:—"Lord Eldon laid it down, and I do not remember that any Judge ever found fault with the proposition, that it must never be forgot to what extent the defendant, one of the parties, admits or denies the agreement. To this I fully accede, and shall always be prepared to act according to that rule." And again he says:—"I agree with the proposition, as laid

(a) 2 Dru. &amp; War. 363.

down by the defendant's Counsel, that I must be satisfied that there was a mistake on both sides, for I cannot otherwise rectify this lease. A mistake on one side might be a ground for rescinding a contract, but never could be relied on as a reason for taking from a man what he thought he was to get under his agreement." In *Bunbury v. Lloyd* (*a*), although evidence was given to show that the settlement was not consistent with the instructions of the settlor, and his prior and subsequent declarations were in conformity with the instructions, but not with the settlement, yet, as it did not appear what was the final contract between the parties, and it was possible that the settlor might have agreed to execute such a settlement as was in fact perfected, Sir Edward Sugden refused to reform the settlement. In this case I have evidence clear enough, I admit, as to what at one time was the intention of Mr. Anderson. But on the other hand, I have the covenant finally drawn in a manner not contradicting the statements of Mrs. Anderson and the three trustees. It has been said that it could never have been the intention of the parties to fasten such a covenant on personal property. However, the case of *Lewis v. Madocks* (*b*) shows how far the Court will go; and the observations of Lord Eldon, when that case came before the Court on the second occasion, tend to show that such a covenant may reach property of any kind. I have seen marriage settlements containing a schedule of personal chattels appropriated to the trusts of the settlement. It is a question of intention; there is nothing *a priori* so impeachable in such a contract as to invalidate it. I should go further than any Judge has yet ventured to do were I now to alter this covenant merely upon the fact that, at a particular stage of the transaction, the covenantor appears to have entertained the intention attributed to him by the plaintiff. I must take the instrument itself as containing the final instructions of the parties. It has been said for the plaintiff that I am not called upon to alter the settlement, but merely to interpret it according to the evidence; but this does not enable the parties to escape from the difficulty.

That brings me to the really important point in the case. The plaintiff calls upon me to say that the covenant, as it now stands in

(*a*) 1 Jo. & Lat. 638.

(*b*) 8 Ves. 150; S. C. 17 Ves. 48.

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—  
Judgment.

1850.

*Chancery.*WHITE*v.*ANDERSON.Judgment.

the settlement, was intended to attach upon such property only as Mr. Anderson should die possessed of, and is to be so construed. The first question is, to what does it profess to apply? It is admitted on both sides that it is imperfectly drawn, and it is also admitted that it applies to the property of Mr. Anderson only. Assuming words to that effect to be incorporated in the covenant, to what period of possession does it refer with regard to his property? The words which I find describing the property are very general and comprehensive:—"Whatever estates and property, whether real or personal, and wherever situate, or either or both;" so wide in their scope, that it seems to me to lie on the plaintiff to show some expression tending to make their application narrower than it would appear from their primary signification—something which would limit their operation to the property of Mr. Anderson at his death. For the plaintiff it has been argued that such would have been the natural intention of the parties in such a case, more especially as Mr. Anderson was engaged in trade. For the defendant it has been strongly relied upon that almost all the property put in settlement proceeded from her side; that numerous and important benefits were derived by Mr. Anderson under that settlement, and that this covenant on his part was but a fair compensation to her for the advantages which she conferred; and that it should be read in the most large and liberal manner. The difficulty on the plaintiff is to show any expression which could control the covenant to property of Mr. Anderson at any particular time. I must confess that I cannot discover any words which say that it means such property only—not of Mr. Anderson—but of his heirs and executors at the time of his death. Some omission, it is said, has evidently been made; and for the plaintiff it is argued that the words "of which he shall die possessed" would fully and naturally supply that omission. But why should not the words "of which he is now, or at any time hereafter shall be, possessed," equally well fill the blank? There would be nothing discordant in such an addition to the general terms in which the clause is already couched. Those terms are sufficiently large to comprise both present and future property, and there is not a word to limit them, in my judgment.

I am not impressed by the argument that the allusion to the death of Mr. Anderson, contained in the covenant, is to be regarded as pointing to the property of which he should then be possessed; that allusion marks the period at which the enjoyment of the annuity is to commence. As to the objection that he was in trade, and therefore ought not and cannot be supposed to have fettered his property by such a covenant, and that if he intended to bind the lands of Boherboy, of which he was then seised, he would have specially named them, I may say that these are observations tending to lead to a different conclusion. The real property which he then had would have fallen far short of securing £250 per annum; the very fact of his being in trade may have suggested to Mrs. Anderson and her friends the necessity of such a covenant; imprudent as it may have been for him, it was not so for her. By not naming any estate in the settlement, he may have wished to leave it open for him to settle any particular property for the purposes of the covenant.

I cannot, for the reasons I have stated, find any limit in this covenant with respect to the time of possession; but if the plaintiff wish that I should send the case for the opinion of a Court of Law, I have no objection to do so.

Counsel for the plaintiff declined this offer, and said that they would rest satisfied with his Lordship's opinion.

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The bill must then be dismissed, but without costs, as there has evidently been some mistake or misapprehension on one, or perhaps both sides. I shall, however, insert a declaration in the decree that the covenant is binding on all the property, both real and personal, of which Mr. Anderson was seised or possessed at the time of, or subsequently to, the execution of the settlement.

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*Feb. 28.**May 3, 5, 19.*

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W. H. being seised of an estate tail in Whiteacre, certain judgments were obtained against him in 1824. Upon his marriage, subsequently in that year, Whiteacre was settled upon him for life, with remainders over for the benefit of the issue of the marriage; and a recovery was suffered to the uses of the settlement. In 1825 W. H., by purchase, acquired Blackacre in fee. In 1826 several other judgments were obtained against him. In 1829 the plaintiff agreed to lend to W. H. £2000 upon mortgage of his fee in Blackacre, and of his life estate in Whiteacre, provided that the judgment creditors of 1824 would release Blackacre from their judgments, to which they assented, and then (1829) executed a deed-poll, which recited that W. H. being desirous to have Blackacre clear of incumbrances, had requested the judgment creditors of 1824 to release it from the incumbrances thereupon by their judgments; and that they, being satisfied that the residue of W. H.'s lands were a sufficient security for their judgments, agreed thereto; and by the operative part they released, exonerated and for ever discharged Blackacre from their respective judgments, and from all writs of execution and executions, and every other writ then sued out, or thereafter to be sued out, against Blackacre, by virtue of their respective judgments, or otherwise in relation thereto; and they agreed (for their respective judgments only) to indemnify W. H. for all costs, damages and expenses which should at any time be incurred by reason of Blackacre being attached in execution under those judgments. Afterwards W. H. executed the proposed mortgage to the plaintiff. *Held*, that both at law and in equity the operation and effect of the deed-poll of 1829 was to exonerate Whiteacre as well as Blackacre from the rights and remedies of the judgment creditors of 1824.

A *scire facias* under O'Neill's Act, issued subsequently to the execution of the above mentioned release, and to the death of W. H., at the suit of one of the above mentioned judgment creditors of 1824, against the three infant daughters of W. H. (who were tenants in tail of Whiteacre under the marriage settlement of 1824) as his co-heiresses-at-law, and against certain other persons as terrenants of Whiteacre. The Sheriff in his return stated that he had summoned the three infants, "co-heiresses of the above named W. H., deceased," and also that he had summoned the terrenants of Whiteacre specially named in the *sci. fa.*, and testified that there was not any other heir or heiress of W. H., and that he (the Sheriff) had not served any other terrenants of Whiteacre, or of any other lands of W. H., except those specially named in the *sci. fa.*. Judgment of revivor was obtained on default.

*Held*, that the original judgment was by the revivor re-established as against

The firstly named judgment was, by an indenture of the 28th of March 1829, assigned to William Elias Handcock (the plaintiff). The secondly named judgment having by assignment become vested in Cecilia Mangan, ultimately devolved, as did also that thirdly named, upon Sarah Egan as executrix of James Egan, in whom both of those judgments had been duly vested by assignment. The fourthly named judgment became vested in Henry Richard Gillespie as administrator of Thomas Gillespie. The fifthly and sixthly named judgments, by assignment of the 20th of September 1824, were vested in Patrick Hanbury, and by further assignment of the 14th of June 1827, were vested in William Burke, and ultimately vested in the Rev. Dr. John M'Hale as his executor. All these judgments had been duly redocketed under 9 G. 4, c. 35; and in Michaelmas Term 1844 the secondly and thirdly named judgments were revived by Sarah Egan against the co-heiresses of William Henry Handcock and the terretenants of the lands of Carrintrilly, &c.

Subsequently to the rendition of the judgments of Trinity Term 1824, by a settlement made, on the 2nd of September in the same year, upon the marriage of William Henry Handcock with Catherine Kelly, he conveyed all the lands of Carrintrilly, &c. (subject to two

Whiteacre, and that the infants, having pretermitted their opportunity of pleading the release to the *sci. fa.*, could not afterwards set up that release as a defence in equity against raising the amount of that judgment out of Whiteacre.

A person, seized of an estate, and indebted by judgment, afterwards upon his marriage settled that estate upon various trusts for the benefit of his intended wife, and the children of the marriage. The settlement contained a recital that the estate was subject to two annuities, and also contained a covenant for quiet enjoyment, but did not comprise a covenant against incumbrances. Subsequently to its execution the settlor acquired other estates by purchase, and acknowledged other judgments. Held, that the prior judgment should be levied wholly out of the unsettled estates, if sufficient, and that the puisne judgment creditors had no right to make the settled estate contribute.

In a suit for an account, foreclosure and sale, by a plaintiff having two incumbrances upon the estate, he is not entitled to *all* his costs of suit in priority with his elder incumbrance, but shall be decreed his costs of suit in priority with that incumbrance, save so far as they are occasioned by his puisne incumbrance; and the costs so occasioned he shall be decreed to have in priority with the puisne incumbrance.

The statute 11 & 12 Vic. c. 48, s. 72, enacting that the release of any portion of lands in Ireland from any judgment affecting the same shall not nullify or affect the force of such judgment as regards the residue of such lands, or any other property not specially released, does not apply to releases executed before the passing of that statute.

*Hyde v. Morley* (Cro. Eliz. 40; S. C. And. 133), *Barrow v. Gray* (Cro. Eliz. 551), *Averall v. Wade* (Ll. & G. temp. Sug. 252), and *Hartley v. O'Flaherty* (Ll. & G. temp. Plunk. 208), considered.

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annuities specified therein), to trustees to hold for himself for life, with remainder to secure a jointure of £700 per annum to Catherine Kelly, with remainder to the first and other sons of the marriage successively in tail male; and in default of such issue, to the use of all the daughters of the marriage as tenants in common in tail general; and in default of such issue, to the use of William Henry Handcock, his heirs and assigns for ever. This settlement, which contained on the part of William H. Handcock a covenant for quiet enjoyment, but no covenant against incumbrances, was shortly afterwards duly registered, and of all the lands comprised in it, except certain subdenominations, William Henry Handcock, in Michaelmas Term 1824, suffered a common recovery to its uses.

On the 6th of May 1825, William Henry Handcock acquired by purchase a fee-simple estate in the lands of Cartron, &c.

In Hilary Term 1826 William Henry Handcock suffered a common recovery of the subdenominations of the settled lands not mentioned in the recovery of 1824, and of the lands of Cartron, &c.

In 1829 William Henry Handcock, being desirous of raising a sum of £2000 on mortgage of the fee-simple in the purchased lands of Cartron, &c., and of his life estate under the marriage settlement in the lands of Carrintrilly, &c., applied to the plaintiff William Elias Handcock to lend him that sum upon the security of the proposed mortgage, to which the plaintiff assented, provided that John Egan and Cecilia Mangan (in whom the judgment obtained by Egan and Derinzy was then vested) and also Thomas Gillespie and William Burke would release the purchased lands of Cartron, &c., from their respective judgments, to which they having agreed, a deed-poll was accordingly executed by them upon the 8th of April 1829 for that purpose. That deed, after reciting the recovery of the judgment by John Egan and Henry Derinzy in Trinity Term 1824, and that it was then (8th of April 1829) vested in Cecilia Mangan, and further reciting the recovery of the two judgments by Elias Robinson Handcock in Trinity Term 1824, which were then (8th of April 1829) vested in William Burke, and the recovery of their respective judgments in Trinity Term 1824 by Thomas Gillespie and John Egan, then proceeded as follows:—"And whereas

the said William Henry Handcock being desirous of having that part of the lands and hereditaments, hereinafter mentioned and described, clear of all incumbrances, hath requested the said John Egan, Cecilia Mangan, assignee of the said John Egan and Henry Derinzy, William Burke, assignee of the said Elias Robinson Handcock and Thomas Gillespie respectively, to release the same from the incumbrances thereupon by their said respective judgments and assignments; and the said John Egan, Cecilia Mangan, William Burke and Thomas Gillespie, being satisfied that the residue of the said lands and hereditaments of the said William Henry Handcock are sufficient security for their several respective judgments and assignments, have severally and respectively agreed thereto. Now know all ye that in pursuance of said agreement, and for and in consideration of the sum of five shillings sterling to each of them, the said John Egan, Cecilia Mangan, William Burke and Thomas Gillespie, in hand paid at or before the ensealing and delivery of these presents, the receipt whereof they do hereby respectively acknowledge, for the purposes aforesaid, they the said John Egan, Cecilia Mangan, William Burke and Thomas Gillespie have, and each and every of them according to his, her and their several and respective interests, and from his, her and their several and respective judgment or judgments and assignments thereof, hath released, exonerated and for ever discharged, and by these presents do, and each and every of them doth for themselves, their heirs, executors, administrators and assigns, wholly and absolutely release, exonerate and for ever discharge all that and those the lands of Cartron, &c. [enumerating the various denominations of the purchased lands], of and from his, her and their respective judgment or judgments and assignments thereof, and also of and from all and every writ and writs of execution and executions, and of and from all and every other writ and writs which now have or hath been, or at any time and from time to time hereafter shall or may be sued or issued out, or executed upon or against the said lands, hereditaments and premises by virtue of his, her or their respective judgment or judgments and assignments, or otherwise in relation thereto; and each and every of them the said John Egan, Cecilia Mangan, William Burke and Thomas

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Gillespie, hereby respectively, and each of them for his, her and their own judgment or judgments and assignments only, indemnifying, promising and agreeing to save harmless and indemnify him the said William Henry Handcock, his heirs, executors, administrators and assigns, of and from all costs, charges, damages and expenses which shall or may at any time or times be incurred or occasioned by reason of the said lands, hereditaments and premises, or any of them, or any part thereof, being attached in execution under and by virtue of such his or their respective judgment or judgments or assignments thereof, or otherwise howsoever, anything herein contained to the contrary in anywise notwithstanding. In witness," &c. This deed-poll was duly registered upon the 2nd of May 1829.

By indenture of mortgage of the 1st of May 1829, William Henry Handcock, in consideration of £2000, conveyed the purchased lands (Cartron, &c.), and also the lands comprised in the marriage settlement (Carrintrilly, &c.), in which he took an estate for life, to the plaintiff William Elias Handcock, his heirs and assigns, by way of mortgage. This deed was duly registered on the 4th of May 1829. Collateral with the mortgage was a bond executed by William H. Handcock to the plaintiff in the penal sum of £4000, with warrant of attorney to enter judgment thereon; upon that bond judgment was entered as of Trinity Term 1843, subsequently to the death of W. H. Handcock, the conuzor, which occurred on the 4th of July in the same year.

By indenture of the 3rd of August 1837, executed under the Fines and Recoveries Act, for the purpose of enlarging all estates tail of William Henry Handcock in all the foregoing lands (both Carrintrilly, &c., and Cartron, &c.), he conveyed all the lands to Sir John Burke, Bart., and his heirs, to hold the same discharged of any such estates tail, to the uses in the marriage settlement of the 2nd of September 1824 declared of the lands thereby granted. This deed was shortly afterwards duly registered.

By his will, bearing date the 14th of June 1843, William Henry Handcock directed that all the judgment debts and other incumbrances affecting his settled estates, which were prior to the date and execution of his marriage settlement, should be raised and levied out

of the several estates granted by that settlement, so as to exonerate all his other property therefrom. And in order to make provision for the payment of his remaining debts, and which were not charged upon his settled estates, and for the legacy thereinafter mentioned, he gave, devised and bequeathed his fee-simple estates of Cartron, &c., to Francis Langan and his heirs for ever, upon trust nevertheless to sell and dispose of the same and apply the produce thereof in payment and discharge of such of his (the testator's) debts as were not charged on his settled estates, and which were not secured by insurances on his life, and also in payment of a legacy of £2000 sterling, which he thereby bequeathed to Sophie Jeanne Ravenard, of Paris, to whom he also bequeathed all the ready money in his possession at the time of his death, and the residue, if any, of the produce of the sale of the lands thereby directed to be sold, and of his personal property of every description, after payment of his debts and funeral and testamentary expenses, and he appointed his wife and sister guardians of the persons of his daughters, and appointed Francis Langan guardian of their fortunes and executor of his will.

William Henry Handcock died on the 4th of July 1843, leaving surviving him his wife Catherine and three daughters, namely, Josephine, Anne and Honoria, his only issue and co-heiresses-at-law. Whereupon these three daughters became seised as tenants in common in tail of the lands of Carrintrilly, &c., comprised in the marriage settlement, subject to a jointure of £700, Irish currency, per annum for their mother Catherine Handcock.

The bill in this cause was filed on the 31st of January 1844 (amended on the 24th of September following) by William Elias Handcock, on foot of the judgment obtained in 1824 by Walter Peter, and assigned by him to the plaintiff, and also on foot of the mortgage of the 1st of May 1829, and the judgment collateral therewith, and prayed an account, sale and foreclosure, and that the real and personal estate of William Henry Handcock should be duly administered by this Court.

The cause came on to be heard before the LORD CHANCELLOR on the 16th of January 1846, when it was by him referred to the Master

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**HANDCOCK.** to take an account of the sum due to the plaintiff on the judgment of 1824, and the mortgage of 1829, and the judgment collateral therewith; and also an account of the real estate of which William Henry Handcock was seized at the time of the rendition of the judgment of Trinity Term 1824, or at any time subsequent; and also an account of all charges and incumbrances affecting the mortgaged lands and premises, and the real estate of William Henry Handcock, subsequent as well as prior to, and contemporaneous with, the mortgage.

The Master's report, filed on the 27th of November 1847, contained the following passage:—"And with reference to the schedule of priorities, it was argued before me, on behalf of the minors, defendants, that the several judgment creditors, who had executed the deed-poll of the 8th of April 1829, did thereby release at law not only the lands mentioned in the said deed-poll, but all other lands on which their respective judgments were at any time a lien. But being of opinion that the said deed-poll is wholly inoperative in law as a release of any lands, and effectual only in equity in favour of the plaintiff, who advanced the said sum of £2000 upon the faith of the said deed-poll, I have arranged the priorities of the said several incumbrances as if such deed-poll had never been executed. But I find that whatever sums shall be raised out of the said mortgaged lands, and allocated to any of the judgment creditors who executed the said deed-poll, must be applied in the first instance to secure the sums due to the plaintiff upon his said mortgage, and that the creditors, displaced by such application, and so far as they are displaced, shall have remedy by standing in the plaintiff's place and order of priority, as against the said mortgaged lands, after the plaintiff's said mortgage shall have been fully secured."

The cause came on upon the 28th and 29th of January 1848 to be heard upon the report, exceptions (taken thereto on behalf of the minors Josephine, Anne and Honoria Handcock and other persons) and further directions, before the Commissioners for hearing causes, who ordered that a case should be made for the opinion of the Court of Common Pleas, and that the questions on that case should be—  
 "First, whether the said deed-poll of the 8th of April 1829 had any

and what legal effect or operation on the rights and remedies of the several parties entitled respectively to the said several judgments of Trinity Term 1824, and who executed the said deed-poll, or any of them, or the persons deriving under them respectively, or any of them, as against the lands (Cartron, &c.) acquired by the said William Henry Handcock, by purchase, on the 6th of May 1825, being the lands mentioned in the said deed-poll, and also mentioned and comprised in the said indenture of mortgage of the 1st of May 1829?"—"Secondly, whether the said deed-poll of the 8th of April 1829 had any and what legal effect or operation on the rights or remedies of the said several parties who executed the said deed-poll, or any of them, or the persons deriving under them respectively, or any of them, as against the said lands (Carrintrilly, &c.) comprised in the said indenture of marriage settlement of the 2nd of September 1824?"

To the above queries the following reply was sent by the Court of Common Pleas:—

"First—We are of opinion that the legal operation and effect of the deed-poll of the 8th of April 1829 was to exonerate the lands acquired by the said William Henry Handcock by purchase on the 6th day of May 1825, from the rights and remedies of the several parties entitled respectively to the several judgments of Trinity Term 1824, who executed the said deed-poll, and of all parties deriving under them."

"Secondly—We are of opinion that the legal effect and operation of the said deed-poll of the 8th of April 1829 was to exonerate the lands comprised in the indenture of marriage settlement of the 2nd of September 1824, from the rights and remedies of the said several parties who executed the said deed-poll, and who were entitled to the said judgments, and of all parties deriving under them."

The case and arguments before the Court of Common Pleas are reported in the 10th vol. of the *Irish Law Reports*, p. 565.

The cause coming before the LORD CHANCELLOR on the 17th of May 1848, upon the return of the above certificate, his Lordship, as a matter of form, affirmed the certificate of the Court of Common Pleas, and said that if the parties wished to re-open the first point

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in it they might petition for a re-hearing ; but he added, that though he had no difficulty in acting on the first part of the certificate, he felt great difficulty in acting on the second part of it, and was not finally prepared to follow it without further consideration (a). His Lordship allowed the exceptions taken to the report, and referred it back to the Master to review the same, having regard to the certificate and the affirmane thereof, and to the rule made on the exceptions, and reserved all further directions until the return of the report.

The Master, by his amended report made on the 24th of December 1849, found that the effect of the deed poll of the 8th of April 1829 was to exonerate both the settled lands (Carrintrilly, &c.) and the purchased lands (Cartron, &c.) from the judgments of 1824 vested respectively in Henry Richard Gillespie and Dr. John M'Hale. But as to the judgments of 1824 vested in Sarah Egan, which were in Michaelmas Term 1844 duly revived against the heir and tenants of the settled estates of William Henry Handcock, the Master found that those judgments were subsisting incumbrances on those settled estates (Carrintrilly, &c.).

In the writs of *sci. fa.* Josephine, Anne and Honoria Handcock were named as co-heiresses-at-law of William Henry Handcock ; Catherine Handcock (widow) and other persons were named as tenants of the lands of Carrintrilly, &c. The Sheriff returned "that he by, &c., honest and lawful men, &c., caused to be made known to Josephine Handcock, Anne Handcock and Honoria Handcock, co-heiresses of the above named William Henry Handcock, deceased, and also Mrs. Catherine Handcock, widow of the aforesaid William Henry Handcock, and guardian of said minors, tenant to the house and lands of Carrintrilly," and also to certain other tenants who were specially named, &c. And he further testified that there was not any other heir or heiress, nor heirs nor heiresses of William Henry Handcock, and that he (the Sheriff) had not served any of the other tenants of the foregoing lands, or any other tenants of any other lands of William Henry Handcock, deceased, the above writs having required him to

(a) *Vide* 11 Ir. Eq. Rep. 472.

serve the foregoing tenants and none others. Judgment was given on both those writs by default.

To the report exceptions were taken on behalf of the Misses Handcock, insisting that the judgments of 1824, vested in Sarah Egan, were not subsisting incumbrances as against the settled lands (Carrintrilly, &c.); that those judgments were not duly revived as against the heir and terretenants of the settled lands of William Henry Handcock, and that those lands, as well as the purchased lands (Cartron, &c.), were exonerated from those judgments by the deed-poll of the 8th of April 1829.

Exceptions were also taken by Henry R. Gillespie and Dr. John M'Hale to the finding by the Master that the lands, both settled and purchased, were by the deed-poll exonerated from the judgments of 1824, respectively vested in them. The exceptions insisted that those judgments were, in equity, in full force as against the settled lands, save so far as regarded the plaintiff's mortgage, and that having regard to the statute 11 & 12 Vic. c. 48, s. 72,\* the Master should have found those judgments to be valid charges as against the settled lands.

The case having come on to be heard on report, exceptions, Feb. 25, 26, 28. merits and further directions, and having been argued on the 25th and 26th of February, the LORD CHANCELLOR, upon the 28th of that month, intimated his opinion that the decree of the 17th of May 1848 had been drawn up in such a manner as to render it necessary that a petition of re-hearing should be presented, in order to re-open the several questions proposed to be raised.

A petition of re-hearing having accordingly been presented, the May 24, 25, 27. case came on to be re-heard, and was argued upon the 24th, 25th and 27th days of May. The following is a statement of the authorities quoted, and an epitome of the arguments addressed to the Court both upon this and the previous hearing:—

\* *Vide* that statute, *infra*, p. 471, note.

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Mr. *H. Martley* (with whom were Mr. *Francis Fitzgerald* and Mr. *Owen*), for the defendants Josephine, Anne and Honoria Handcock, tenants in common in tail under the marriage settlement of 1824, and co-heiresses of William Henry Handcock.

Argument.

First—The certificate of the Court of Common Pleas is right in stating that the legal effect of the deed-poll of 1829 was to exonerate the unsettled lands (Cartron, &c.) named in it from the judgments of 1824, vested in the parties who executed that deed, which was an effectual release from those judgments at least, containing as it did a release of all executions against the lands named : *Littleton*, s. 504; *Hyde v. Morley* (a); *Sheph. Touch.* pp. 363, 364; *Rolle Ab. tit. Statute*, M, pl. 6, 7.

Secondly—The certificate is also right in stating that the legal effect of the deed-poll of 1829 was to exonerate the settled estates (Carrintrilly, &c.), although not named in it, from the same judgments. If the conuzee of a statute merchant purchase part of the land, and then the conuzor alien the residue of the land to J. S., a stranger, J. S. shall hold his purchased land discharged, because (in the event of the lands in his hands being taken in execution under the statute) he ought to have contribution against the conuzee, who cannot contribute to himself, and therefore by reason of his purchase all the land which shall come into the hands of the feoffees is discharged : *Rolle Ab. tit. Statute*, M, pl. 8; *Humphrey v. Harneage* (b); *Fitzherbert's Nat. Brev.* 104 N, and 105 E. *Rolle* also says that if the conuzee release part of the land liable to the statute by special words making mention of the statute (as he may), and then the conuzor alien the rest of the land; *quare*, whether the alienee shall hold this charged, inasmuch as it was chargeable in the hands of the conuzor after the release? But *semble*, that the alienee should hold it discharged, because it seems that it is all one with the case if the conuzee had purchased part, and then the conuzor had aliened: *Rolle Ab. tit. Statute*, M, pl. 11. The construction of the deed-poll must be the same in equity as at law : *Iggulden v. May* (c).

(a) Cro. Eliz. 40; S. C. And. 138.

(b) Cro. Eliz. 756.

(c) 9 Ves. 325.

But it was argued before the Common Pleas that the operative part of the release was qualified by the recital of W. H. Handcock's desire to have the lands of Cartron clear of all incumbrances, and that the re-lessors being satisfied that the other lands of W. H. Handcock were sufficient security for their several judgments, had agreed to release, the lands of Cartron from the same. But in the cases cited in support of this argument there was such a reservation of the right as to cut down the alleged release to a mere covenant not to sue; and in *Solly v. Forbes* (*a*) there even was a reservation of the right to sue Ellerman (to whom the release was given) jointly with Forbes. That case, moreover, is unsavourably commented on by Lord Denman in *Nicholson v. Revill* (*b*). Here there is not any reservation either of the right to sue the debtor, or of the right against his other lands.

The creditors who executed the deed-poll have, by that act, prevented themselves from proceeding against the settled estates. The primary fund for the payment of those judgment debts was the unsettled estates: *Averall v. Wade* (*c*); *Hartley v. O'Flaherty* (*d*). By releasing that primary fund they have released the secondary fund—viz., the settled estates. If the principal be released, the surety is released. It would be inequitable that, by an act to which the persons claiming under the settlement were not privy, the judgment creditors could deprive them of the right to have the settled estates exonerated from the judgments out of the unsettled estates: *Thompson v. Harrison* (*e*); *Bernal v. Donegal* (*f*). The fact that the unsettled estates were acquired by Wm. H. Handcock subsequently to the settlement does not make any difference. To restrict the operation of the release to the unsettled lands would therefore render it a nugatory deed; because, if the amount of the judgments were levied out of the settled lands, the owners of those

(*a*) 2 Brod. & Bing. 38; S. C. 4 Moo. 448. That case has been inadvertently omitted in the report in 10 *Ir. Law Rep.* of the argument in *Handcock v. Handcock* before the Common Pleas. It was cited there on behalf of the judgment creditors.

(*b*) 4 Ad. & El. 683.

(*c*) Ll. & G. *temp.* Sug. 252.

(*d*) Ll. & G. *temp.* Plunk. 208.

(*e*) 1 Cox, 344.

(*f*) 3 Dow. 133; S. C. 1 Bl. N. S. 594.

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lands would be entitled to exoneration out of the unsettled lands. The judgment recovered in 1824 by Walter Peter, now vested in the plaintiff, and which was not one of those affected by the deed-poll of 1829, must be wholly levied out of the unsettled lands.

Argument.

Fourthly—The revivor of the judgments vested in Sarah Egan has not set them up as against the settled lands, because the tenants in tail under the settlement of 1824 were summoned not as terre-tenants, but as the co-heiresses of William Henry Handcock, and as such could not have pleaded the release : *Henry v. Jones* (a); *Carroll v. Cooke* (b); and even if they could, a Court of Equity will not hold them bound by their having pretermitted their legal defence: *O'Neill v. Browne* (c).

Mr. H. G. Hughes and Mr. Isidore Blake, for Sarah Egan.

First—The unsettled lands were not effectually released even at law by the deed-poll: *Barrow v. Gray* (d) (a case which must be considered as overruling *Hyde v. Morley* (e)) ; 19 *Vin. Abr. Release*, G; 2 *P. Wms.* 491; 2 *Rolle Abr.* 405, T, pl. 6. A good plea of release should show a release of all executions generally: *Rastall's Ent.* p. 250; *Moyle's Ent.* p. 131. In those precedents the pleas went to the judgment itself. The mere acquittance of a portion only of the lands has not anywhere been held a good plea to a *scire facias*. The words in the deed-poll “of and from all and every writ or writs of execution” are limited to the particular lands of which that deed treats. It does not discharge the person or goods of the conuzor, and therefore the Master was right when, in his first report, he stated that the deed was altogether inoperative. All the cases cited in support of the release were cases of statutes merchant, statutes staple or recognizances; but none were cases of a release, by deed, of part of the lands of the conuzor of a judgment. When a statute merchant is forfeit, the conuzee forthwith may have execution—first against the body, and next against the goods and lands. When a statute staple or recognizance is forfeit, the body,

(a) *Alc. & Nap.* 14.

(b) 1 *Jebb & Sy.* 33.

(c) 9 *Ir. Eq. Rep.* 131.

(d) *Cro. Eliz.* 551.

(e) *Cro. Eliz.* 40.

goods and lands may be taken together: *Sheph. Touch.* by *Preston*, p. 358. At Common Law the judgment creditor had not any right whatsoever against the lands; his remedy was against the person and goods of the debtor. The Statute of Westminster the 2nd gives to the creditor an option by the writ of *ejectus*; the very name implying that it is an option which, if he exercise, he was entitled to have a writ directed to the Sheriff to put him (the creditor) in possession of a *moiety* of the lands; until he exercises that option he has no direct right against the lands: *Neate v. Duke of Marlborough* (*a*). The alleged Common Law doctrine of contribution amongst feoffees of the lands of the conuzor ought not to aid in extending the operation of the deed-poll. It is difficult to say how, if at all, such a right was worked out at Common Law.—[Counsel here referred to the observations of Lord Plunket in *Hartley v. O'Flaherty* (*b*), and the passage cited by him from *Herbert's case* (*c*).]—An *audita querela* lies only where the lands have been actually taken in execution: *Fitzherbert, N. B.*, pp. 103, 104. The conuzor, or those who fill the same position that he does, could not have an *audita querela* against the other feoffees: *Ross v. Pope* (*d*).

In *Trot v. Spurling* (*e*) the comuzee gave a defeazance that if he sued execution of the lands which the conuzor had in Kent, the statute should be void; the conuzee, contrary to this defeazance, extended the land in that county; it was adjudged that an *audita querela* lay to avoid the execution and vacate the statute; for the defeazance was no way repugnant to the statute, because the conuzee might still extend the lands of the conuzor in any other county and take his body and goods: *Bac. Ab. Execution*, B, 7. Lord Eldon says, in *Hannah v. Perkins* (*f*), “a covenant not to sue one of several co-obligors is not at law a release of the co-obligors (*g*). That may introduce a question whether such a covenant is not a release in equity.”

(*a*) 3 Myl. & Cr. 417.

(*b*) Ll. & G. *temp. Plunk.* 208.

(*c*) 3 Rep. 14, *b.*

(*d*) *Plowd.* 72.

(*e*) Moo. 811, pl. 1097.

(*f*) 2 *Swanst.* 550.

(*g*) *Vide Dean v. Newhall*, 8 T. R. 168; *Hutton v. Eyre*, 6 *Taunt.* 289.

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Argument. Those authorities show that the deed-poll cannot be regarded in any higher view than that of a covenant not to sue. Where an obligee covenants not to sue an obligor at all, he may plead it as a release in order to avoid circuity of action: *Hodges v. Smith* (f); *Smith v. Mapleback* (g); *Burgh v. Preston* (h). But if the obligee covenant not to sue the obligor for a certain time, it does not amount to a defeasance, nor can it be so pleaded, but is a covenant only, for a breach of which the obligor may bring his action: *Ayloffe v. Scrimshire* (i); *Thimbleby v. Barrow* (k); *Forde v. Beach* (l).

Supposing the deed-poll to have the operation contended for, at all events the effect of the revivor of the judgments vested in Sarah Egan was to restore them to their original position as against all the persons summoned by the Sheriff, and therefore as against the settled lands. "If the judgment of revival do not confer a new right to receive the money, neither does the original judgment. They both stand on the same foundation; they are equally the judgment of the Court; they equally bind the land:" *per Pennefather, B.*, in *Farran v. Ottiwell* (m). In the cases of *Henry v. Jones* (n), and *Carroll v. Cooke* (o), cited for the co-heiresses of William Henry Handcock, it was admitted by the Court that if the heir show an interest in the lands he may plead the non-seisin of his ancestor, or any other plea in defence of that interest; and to that effect is the observation of Pennefather, B., in *Donohue v. Firman* (p), and the

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| (a) 1 Beav. 496.            | (b) 18 L. J., N. S., Q. B. 214.                    |
| (c) 2 Bro. & B. 38.         | (d) 2 Ld. Ray. 1306.                               |
| (e) 1 Bos. & P., N. R. 113. | (f) Cro. Eliz. 623.                                |
| (g) 1 T. R. 446.            | (h) 8 T. R. 486.                                   |
|                             | (i) 1 Show. 46; S. C. Comb. 123, 124; 2 Salk. 473. |
| (k) 3 M. & W. 210.          | (l) 5 Dow. & L. 610.                               |
| (m) 2 Jebb & Sy. 150.       | (n) Alc. & N. 14.                                  |
| (o) 1 Jebb & Sy. 33.        | (p) 1 Jones Exch. R. 511, 512.                     |

decision in *Mannix v. Gray* (a) and *White v. White* (b). The question as to the validity of the release might thus have been raised on demurrer. It is said that the Misses Handcock may not have had notice of the release; however, their answer, claiming the benefit of it, was filed before the revivor. And want of notice is not sufficient ground for nullifying the effect of the revivor. Not having pleaded the release to the *scire facias*, they are now concluded by the judgment of revivor: *Keane v. Barry* (c); *Hannor v. Mase* (d).

The statute 11 & 12 Vic. c. 48, s. 72, being declaratory, ought to be construed retrospectively: 7 Bac. Ab. Statute, E, citing *Brewster v. Kitchell* (e); *Dwarris*, 2nd ed., pp. 605, 614; *Doe d. Angell v. Angell* (f).

Mr. Christian and Mr. Edward Pennefather, for H. R. Gillespie, relied on the authorities quoted on behalf of Sarah Egan to show that the deed-poll did not at law release either the settled or unsettled estates from the judgments vested in the executing parties; and having for the same purpose cited Co. Lit. p. 265, b, proceeded as follows:—

In addition to the authorities already mentioned as establishing the doctrine that a deed of release should be interpreted according to the apparent intention of the parties, and in support of that proposition will be found *Payler v. Homersham* (g); *Lampon v. Corke* (h); *Wilford v. Morris* (i); *Upton v. Upton* (k), and *Thompson v. Lack* (l); in which last named case Wilde, C. J., vindicates *Solly v. Forbes* (m) from the disparaging commentary of Lord Denman in *Nicholson v. Revill* (n). The effect of the recital was either to deprive the operative part of the deed-poll of any force as a release, or to withdraw the settled lands from its scope. The

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| (a) 1 Jebb & Sy. 42, n.           | (b) Ibid.                |
| (c) 8 Ir. Law Rep. 211.           | (d) Hob. 283.            |
| (e) Salk. 198.                    | (f) 9 Q. B. 328.         |
| (g) 4 M. & S. 423.                | (h) 5 B. & Ald. 611.     |
| (i) 2 Lev. 214; S. C. 2 Show. 47. | (k) 1 Dowl. Pr. Ca. 400. |
| (l) 3 M. Gr. & Sc. 540.           | (m) 2 Brod. & B. 38.     |
| (n) 4 Ad. & E. 683.               |                          |

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covenant in the end of the deed shows an intention to reserve the remedies of the executing creditors against the settled estates. Even at law the deed-poll should rather be held altogether inoperative than be suffered to have an operation directly opposite to the plain intention of the parties to it.

Is the purchaser of an estate to be fettered in his rights over it merely because his previously acquired estates are in settlement? When both estates are in the couzor at the time of the settlement of one estate, purchasers under that settlement may have a right to contribution against the other estate, but not where that other is a subsequent acquisition. If a creditor enter into a composition with his principal debtor, at the same time stipulating for a reservation of his rights against the surety, the right to sue the surety remains, notwithstanding the general rule of law, *quaia conventio vincit legem*; *Ex parte Glendinning* (a); *Anonymous* (b); *Philpott v. Briant* (c); *Nicholls v. Norris* (d); *Ex parte Gifford* (e); a doctrine recognized also in *Kearsley v. Cole* (f).

At all events a Court of Equity will control this deed in its operation so as to render it conformable to the intention, no consideration having passed to the judgment creditors on its execution, and their demands yet remaining unsatisfied: *Hatchell v. Cromorne* (g).

As to the right of exoneration:—In *Averall v. Wade* there was a covenant against incumbrances; here there is not. The recital of the existence of the two annuities, which were mere family charges, does not show any disposition to exclude general incumbrances. There is a wide distinction between a family settlement and a conveyance to a purchaser.

The statute 11 & 12 Vic. c. 48, s. 72, is retrospective; the word "continue" shows this to be so; and the construction of a statute must be made in suppression of the mischief and in advancement of

(a) *Buck.* 517.

(b) 1 C. P. Coop. 609, Appx.

(c) 1 Moo. &amp; P. 754; S. C. 4 Bing. 717.

(d) 3 B. &amp; Ad. 41.

(e) 6 Ves. 805.

(f) 16 M. &amp; W. 128.

(g) Ll. & G. *temp.* Plunk. 236.

the remedy: *Co. Lit.* p. 381, b. In *Greene v. Fitzgerald* the Chief Remembrancer has held the statute to be retrospective.

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Mr. *Exham* (*amicus Curiae*) said that in *Scanlan v. Towers* HANDCOCK. Master Brooke had made a similar decision.

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The *Attorney-General* (Monahan), Mr. *Baldwin* and Mr. *Burroughs*, for the plaintiff, argued in support of the certificate of the Court of Common Pleas, and of the report, and relied on the authorities above mentioned on that side of the question, and said:—The paramount intention on the face of the release was to exonerate the unsettled lands from the judgments. The plaintiff lent his money upon the mortgage on faith of that release, and so the first report finds. In *Hatchell v. Cremorne* (a) the release was upheld, so far as purchasers who had bought on the faith of it were concerned. All the estates should contribute rateably to the payment of the judgment recovered by Walter Peter in 1824, and now vested in the plaintiff, and which judgment is not one of those released by the deed-poll: *Dyer*, p. 331, b; 5 *Vin. Ab. Contribution*, pp. 561, 562; *Fitz. Nat. Brev.* pp. 234, 235; 2 *Inst.* pp. 395, 396; 2 *Story's Eq. Jur.* p. 660, 5th ed.; *Barnes v. Racster* (b); *Aldridge v. Forbes* (c). In *Averall v. Wade* (d) there was a covenant against incumbrances; here there is not. Counsel also mentioned *Brown v. Lynch* (e).

Mr. *Brewster*, for a judgment creditor of 1826, denied the right of the defendants Handcock claiming under the settlement to exoneration of the settled estates out of the unsettled estates; and in order to show that the statute 11 & 12 *Vic.* c. 48. s. 72, was not retrospective, cited 2 *Inst.* p. 292; *Gilmore v. Shyter* (f); *Towler v. Chatterton* (g); *Couch v. Jeffries* (h), and *Kay v. Goodwin* (i).

Mr. *Greene* and Mr. *J. H. Orpen*, for other judgment creditors of 1826.

(a) *Ll. & G. temp. Plunk.* 236.

(b) 1 *Y. & C., C. C.* 403.

(c) 4 *Jur.* 20.

(d) *Ll. & G. temp. Sug.* 252.

(e) 2 *Jo. Exch. R.* 706.

(f) *Sir T. Jo.* 108.

(g) 6 *Bing.* 258.

(h) 4 *Bur.* 2460.

(i) 6 *Bing.* 576

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Mr. *Frederick Walsh* and Mr. *P. Blake*, for Dr. M'Hale.

Mr. *Francis Fitzgerald*, for the defendants Handcock, in reply.

When a party recovers a judgment, he has established his right to the debt ; his remedy was at Common Law, an execution against the goods or person of the debtor. The Statute of Westminster the 2nd gave a right to take a moiety of the lands. There were therefore three remedies, viz., one against the person, one against the goods, and one against the lands. When a man has divers means to come to his right, he may release one of them specially, and yet take benefit of the other : *Altham's case* (a) ; *Co. Lit.* p. 286, b. The remedy therefore against the body and goods remained, although the right to take the lands in execution was destroyed by the deed-poll of 1829. The case of *Trot v. Spurling* (b) is with us in principle, although cited against us ; and in *Ross v. Pope* (c) it is laid down, that although the conuzee of a statute purchase part of the lands, yet he may still take the body or goods of the debtor. *Hyde v. Morley* (d) is not overruled by *Barrow v. Gray* ; the true distinction is taken between those cases in 3 *Bac. Ab. Execution*, B, p. 373, 7th ed. :— “If the conuzee releases to the terretenant all right, interest and demands, together with all suits and executions, and afterwards sues execution, the terretenant shall have an *audita querela* to set aside this execution ; and this differs from the case of *Barrow v. Gray*, in *Cro. Eliz.* ; for there the conuzee released only all his right, interest and demand to the terretenant, which was held not to be sufficient, because he had only a possibility, and no interest in the land before execution, and consequently could not release what he had not ; but in the former case (*Hyde v. Morley*), though the conuzee had no right to the land before execution, yet there are words sufficient to discharge the execution, since it is released by express words ; and in the first case the words of the release refer to the executions, suits and demands upon the statute, which statute, since it was in being, the executions and demands upon it may be released at any time ; but in the other case the words,

(a) 8 Rep. 152.

(b) Moo. 811.

(c) Plowd. 72.

(d) Cro. Eliz. 40.

'right, title and interest' relate to the land, which the conuzee had no interest in until execution sued, and therefore cannot release or transfer over what he had not; besides, in the first case the conuzee has released all suits by which, says my Lord Coke (*Altham's case (a)*), 'the execution is gone, because no common person can have execution without prayer and suit to the Court.' The best report of *Hyde v. Morley* is that in *Anderson*, p. 133, where the reason for the decision is given. It would seem that both it and *Barrow v. Gray* arose upon the same deed; but the words of release in the former case were incorrectly stated in *Barrow v. Gray*, and it is not matter of surprise that the Judges of the Common Pleas, when referred to by Popham, J., denied having made any such decision as they were then represented to have done. In *Barrow v. Gray* the decision was right, it having been made upon the words "right, interest and demand in the land," those being the words before the Court in the special verdict in that case, beyond which special verdict they could not travel; although in fact, as appears from *Hyde v. Morley*, the deed of release itself contained sufficient words to discharge the execution.

Admitting the proposition involved in *Solly v. Forbes*, and cases of that class, that the operative part is to be governed by the intention patent on the recitals, &c., yet if the intention appear to be to do a particular act, the necessary consequences of that act cannot be controlled by the Court. The recital here shows the intention to release the unsettled lands (Cartron, &c.), and does not disclose any intention to reserve any remedy against them. The covenant aids this view of the case. If this deed-poll had been pleaded at law by the terrenants of the unsettled lands, it could hardly have been contended that it was not an absolute release of those lands. The only release that could be pleaded by a conuzor is a general release of all executions; but a terrenant may plead a release to him by the plaintiff: *Com. Dig. Pleader*, 3, L 14. The authorities already quoted by Mr. Martley show that the inevitable consequence of a release of the unsettled lands was a release of the settled lands also.

There is no difference between a recognizance at Common Law

(a) 8 Rep. 153, b.

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and a judgment. Only a moiety of the lands can be taken, and a younger co-neeze of a statute, in possession of part of the lands of the conuor, has been held entitled to an *audita querela* to remedy the execution of an elder recognizance, where the reconuzee had taken a moiety of the lands in the possession of the conuzee only, for the reconuzee ought to have sued execution of a moiety of *all* the lands of the debtor : *Dean v. Hind* (a). All the lands may be taken under a recognizance in the nature of a statute ; but the case just quoted shows that all the lands are liable to a judgment, although a moiety only may be taken. The judgment binds the moiety of the land the defendant has at any time after the judgment, and therefore if the defendant alien any part of the lands, the plaintiff may extend the moiety remaining in the hands of the defendant without going to the lands in the hands of the alienee, because he may take the moiety of the lands in the estate. But after the alienation the conuor himself shall not have contribution, because it is his own debt, with which the plaintiff has chosen to load the lands remaining in his hands ; but if there are several alienations, the judgment equally binds them all, and therefore all must be equally contributory, and the execution ought not to be laid upon one only : *Gilb. on Executions*, p. 42.

As to the revivor of the judgments vested in Sarah Egan, it would be the narrowest ground of estoppel to hold that the omission of the infant defendants to plead the release to the writs of *scire facias* estopped them from disputing the liability of the settled lands to those judgments. The infants were summoned as heirs and not as terretenant. They could not have pleaded this release as heirs, because it is not a general release of all executions : 2 *Wms. Saund.* 6, n. 1 ; *Bac. Abr. Execution*, B, 4. The deed may have been in the possession of the mortgagee (the plaintiff) without their knowledge. If, before the passing of O'Neill's Act, they had omitted to plead that there were terretenant not summoned, yet they would not have been barred of relief by *audita querela* : *Very v. Carew* (b) ; *Gilb. on Executions*, p. 48. O'Neill's Act ousts the plea of non-joinder of terretenant, but saves the remedy for contribu-

(a) Cro. Eliz. 797; S. C. Yelv. 12.

(b) Moo. 535, pl. 700.

tion against unsummoned terrenants. How was that to be enforced except by *audita querela*? The same reasoning is applicable to this case, although the minors have not pleaded the release to the *scire facias*, for this Court will grant them the relief which at law they may have had by *audita querela*.\* A party permitting a judgment to go against him as heir is not in any other capacity estopped by it.

As to the right of exoneration of the settled estates out of the unsettled estates, Counsel distinguished *Averall v. Wade* and *Hartley v. O'Flaherty* from *Barnes v. Rooster*, and cited *Hickton v. Collis* (a), to show that the statute 11 & 12 Vic. c. 48, s. 72, is not retrospective.

The LORD CHANCELLOR having stated the facts of the case, proceeded to say:—

There are three points to be considered, viz.—first, the effect of the deed of release executed on the 8th of April 1829; secondly, the effect of the revivor of the judgments vested in Sarah Egan; thirdly, the question of contribution as respects those judgment creditors, who are prior to the settlement, but not parties to the release, or not bound by it if they were parties.

The first point comprises three questions, namely—first, what is the legal effect of the deed of release upon the unsettled lands which it purported to release? Secondly, what is its legal effect upon the settled lands? Thirdly, is there any equitable principle to prevent the operation of the release? It was first argued as to the effect of the deed of release, that so far from discharging the lands not mentioned in it, it does not even at law discharge the lands particularly specified from the judgment. But on this question I see no reason to doubt the correctness of the opinion of the Court of Common

(a) 10 Ir. Eq. Rep. 447.

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\* But *Gilbert* (p. 49) admits the general rule, that "there shall never be an *audita querela* for what could have been pleaded to the *scire facias* in bar of the execution, or in discharge of the defendant's lands. And the plea of non-joinder would not have shown *quare executionem habere non debat*, but only delay the plaintiff until the others were brought in."

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Pleas. The intention, to the extent of discharging the specified lands, is plainly stated, the words being that the parties "release, exonerate and for ever discharge" the lands enumerated "from the judgments and from all writs of execution, and from all and every other writ and writs which now have or at any time hereafter shall or may be sued or issued out or executed upon or against the said lands," &c., by virtue of the judgments or in relation thereto. The case is expressly within the authority of *Hyde v. Morley* (a), where the release by the conuzee of a statute merchant of all right in the lands was stated to be of no avail, because the conuzee had no right in the land before execution; but the release being also of "all demands, actions, suits and executions," it was expressly ruled that those words were sufficient to release execution on the statute. That case has not been overruled; and although it is said in *Barrow v. Gray* (b) that the Judges did not remember any such decision, yet it is manifest that the case was erroneously quoted there. The question in *Barrow v. Gray* was, whether a release of the right and title of the conuzee was sufficient? and it was held, in accordance with the opinion of the Judges on that point, in *Hyde v. Morley*, that it was not. *Hyde v. Morley* is quoted erroneously as having decided the contrary, and nothing was said about the release containing the words "all demands, actions, suits and executions." The case in the *Year-book*, 25, Assize 7, is precisely to the same effect, and it is so quoted by *Rolle Abr. tit. Release*, M, pl. 1; and the cases of *Hyde v. Morley* and *Barrow v. Gray* are referred to for the same distinction in 3 *Bac. Ab. tit. Execution*, B, 7, p. 373, 7th ed. Besides, here the deed expressly "discharges" and "exonerates" the lands from the judgments and all executions upon them, and it would therefore seem to contain stronger words than the mere word "release." If the conuzee make a deed that the conuzor shall hold the land discharged of the statute, if the conuzor alien the land and re-purchase, yet it is not chargeable: 45 *Edw.* 3, 22 b, referred to in *Rolle Abr. Statute*, M, pl. 6.

This then being so, the next question arises as to the effect of this release and discharge on the settled lands. The Court of

(a) *Cro. Eliz. 40*; S. C. And. 133.

(b) *Cro. Eliz. 551*.

Common Pleas has certified its opinion that the operation of the release was to discharge those lands also, in which opinion I am disposed to concur. There cannot be any question of the liability of all the lands to an execution on the judgment; and the same law applies to the case of a statute; and it has been the settled doctrine of the law from very early times, that when the conuzor of a statute aliens the lands bound by it, in different parcels, and execution is sued by the conuzee against one of the grantees, he may insist on and enforce contribution against the others. All the old authorities respecting the effect of a purchase of part of the lands of the conuzor by the conuzee himself proceed on this principle. It is unnecessary to go through them. The law is clearly so laid down in *Ross v. Pope* (*a*), and is so stated in *Sheph. Touch.* p. 365, and *Bac. Ab. tit. Execution*, p. 703. The result of that doctrine is, that when the conuzee himself purchase part of the land from the conuzor, although the effect of that transaction is, as between those parties, not to discharge the person of the conuzor, or any lands remaining in his hands, the settled rule has been that the conuzee's right of proceeding against the lands of the conuzor, which have passed into the hands of other feoffees, is wholly extinct. In this point the case in *Plowden* is also a distinct authority. He (the conuzee) cannot, as it is said, be a contributory to a demand due to himself in respect of the lands in his own seisin. It is not easy to see any distinction in this respect between an actual and express discharge of a portion of the land of the conuzor by the deed of the creditor, and the discharge effected by operation of law in the case of a purchaser; and no such distinction is to be found in the authorities. In *Rolle Ab. Statute*, M, pl. 11, the case of a release is put as being "all one" with the case of a purchase by the conuzee of parcel of the land. I think that there is no distinction, and concur in this point with the Court of Common Pleas. The case is analogous to that of a rentcharge, where by law a release of part of the land charged will discharge the whole. This doctrine is discussed in Mr. *Preston's* edition of *Shepherd's Touchstone*, p. 345 (to which I shall refer hereafter), and the remarks there bear very much on the next

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(a) *Plowd.* 72.

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question in this case, as to the words here alleged to amount to a reservation of right to other lands. I cannot, in the effect of a release so framed, see any distinction between the case of a statute staple or statute merchant and a judgment. The Act of Parliament relating to statutes gives a right of execution against all the lands of the conuzor. The Statute of Westminster gives a right to the judgment creditor of execution against a moiety; but that means a moiety of all the lands. The principle must be the same—the same reasons apply—the same right of contribution exists : 2 Inst. p. 396. The conuzee cannot elect to have delivered to him the land of which he is already seised, and it would be partial and unjust to take that of the other party.

But it is said that this release is in equity to be controlled by the intent and language of it, it being contended that the intention expressed in this deed is only to discharge the particular lands, and that the Court will accordingly modify the release, so that it shall not go beyond the particular intent.

Now, it has, on the other hand, been well observed that, if this release have, as it must have, the effect of leaving the released lands still liable to contribution or indemnity at the suit of the owners of the settled lands, the necessary consequence of the modification sought would be to render the whole instrument entirely inoperative, save, perhaps, so far as any advantage could in that case be had against the judgment creditors on the covenant to indemnify ; it is further to be observed that this deed is, in its terms (and if it operate at all, does in fact, according to the authorities, operate as), an actual release of all the lands settled and mortgaged. To introduce a clause, therefore, that it shall not operate, as in law it does operate, would be contradictory and repugnant.

In *Everard v. Herne* (a) it is expressly laid down and agreed to by the whole Court, that where two are bound in an obligation, and the obligee releases one, provided that the other shall not take any benefit from this release, it is a void proviso. This point must have been also considered by the Court of Common Pleas, and must have been considered as also applicable to the equitable view of the ques-

(a) *Littleton's Rep.* 191.

tion, because the suggested equity is merely on the construction of the release; and the cases abundantly show that an equitable construction would be open to a Court of Law. The case was fully argued in the Common Pleas upon that view; and without holding that the point was untenable, the Judges of that Court could not have certified as they have.

Many cases were cited to show that the general words of a release will be controlled by the recital, so as to confine it, as between the parties thereto, to particular debts. The case of *Payler v. Homershaw* (a) is one of a long series of authorities to the same effect, as it is stated by Taunton, J., in *Upton v. Upton* (b):—"The general words of a release may be limited by the particular matter out of which the release springs, and the particular intent of the parties by whom the release is executed;" and for this position he relies on *Payler v. Homershaw* and *Solly v. Forbes* (c); which last named case was that principally relied on by Counsel in support of the claims of the judgment creditors. But that was not the case of a distinct unqualified release; it was undoubtedly in form a release to one of two parties, but it expressly excepted out of the release any claims or demands which the creditor had against the co-partner, either separately or as a partner with the person to whom the release was given, or against the joint estate; and also expressly reserved the right to sue both the partners, so that in fact it was not in *legal* form a release at all of the joint demand. Some cases were referred to in the argument of that case by Counsel for the defendant there, in support of the proposition that the exception was repugnant and void; but I do not observe that *Everard v. Herne* (d) was particularly referred to; and *Solly v. Forbes* was expressly decided with reference to its special nature as found by the language of the release itself.

There are many decisions establishing the proposition, that in the case of principal and surety a composition deed may be executed discharging the principal, but with an express reservation of the

(a) 4 M. & S. 423.

(b) 1 Dowl. Pract. Cases, 406.

(c) 2 Brod. & B. 38.

(d) Littleton's Rep. 191.

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remedy of the creditor against the surety; and when such a reservation is expressly made, the Courts have given effect to it, although in the result the surety was at liberty to enforce his rights against the principal, and in fact defeat the entire operation of the deed.

Those cases were referred to in the late case of *Kearsley v. Cole* (a). Supposing that this doctrine could apply to a case like the present, what is there in the release itself to sustain the application of them to this particular instrument? It is, I think, plain that the mere fact of the release being of particular lands would not be sufficient. In *Shepherd's Touchstone*, by *Preston*, p. 345, it is laid down that if one have a rentcharge out of twenty acres, and release all his right in one acre, hereby all the rent is extinct.—[His Lordship here read the observations of Mr. *Preston* as to this rule respecting rentcharges, and the difficulties thereby occasioned in practice; and that where a part of the land is released, and a clause added that the release shall not extend to extinguish the rent, and that the other lands shall remain chargeable with the rent, and that the rent-charger may distrain thereupon, yet that the rentcharge is altogether released, and that the additional clause does not preserve the original rent, but amounts to a grant of a new rent, and consequently the grantee loses priority as against intermediate incumbrancers.]—But here the only other lands pointed at are those of the debtor, and may be satisfied by his life estate; and I cannot elicit such a special reservation from the covenant of indemnity. The very declaration that the re-lessors considered the remaining lands of the debtor to be sufficient, without resorting to those mortgaged, shows that the parties were not contemplating the case of a person who would have a right of contribution against the mortgaged lands, but that they were considering only the lands of the debtor himself, who, according to the authorities, could not make any such claim.

In regard to the covenant for indemnity, it is hardly to be supposed that the parties would trust merely to such a covenant as it, if they contemplated any future liability, in the lands released, to contribution on the debt.

For all these reasons, I concur with the opinion of the Court of

(a) 16 M. & W. 135.

Common Pleas as to the effect of this release, as well on the settled as on the mortgaged lands.\*

It has been contended, however, that since the opinion of that Court was given, and since the case was first brought before me on their certificate, an enactment has been made which has altered the law on this subject, and that the judgment creditors are entitled to the benefit of it. This is the 72nd section of the first Incumbered Estates Act (11 & 12 Vic. c. 48.)—[His Lordship here read the section.†]

Now, this is in terms prospective, the words being “the release, &c., shall not operate,” &c.; i. e., the future release. I have high authority for saying that the clause was not intended to be retrospective; and it is plain that if it should be so construed, it would have the effect, as in this case, of disturbing and defeating existing

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\* For an important decision upon the effect of a composition deed, in form a release, but containing certain reservations, *vide* the recent case of *Squire v. Ford, coram* Sir Geo. Turner, V. C., reported 15 *Jurist*, p. 619.

† The above Act received the Royal Assent on the 14th of August 1848. The 72nd section is as follows:—“ And whereas doubts are entertained whether, when a judgment affects lands in Ireland, and when the person entitled to such judgment is willing to release a portion of such lands in order to the sale thereof, or otherwise, he can grant such release without nullifying the effect or validity of such judgment upon the residue thereof, or any other property which it is intended should remain subject to such judgment; and whereas it is expedient that such doubts be removed, be it enacted, that the release of any portion of lands in Ireland from any judgment affecting the same shall not operate, or be construed to extend or operate, so as to nullify or in any manner to affect the validity and force of such judgment as regards the residue of such lands, or any other property not specially released from such judgment, but that such judgment shall continue to affect such residue or other property, notwithstanding such release, in like manner, and with the like powers to enforce payment of interest and principal, and to all intents and purposes, as if such deed of release had not been executed.”

That a release, in the language of the foregoing enactment, of any portion of lands from a *judgment* affecting the same would be effectual, although not containing any express relinquishment of the right to issue *execution*, appears from the following passage in *Shepherd's Touchstone*, by *Preston*, p. 343:—“ By a release of all judgments, without more words, is he that maketh it (the release) barred of the effect of any judgment he hath against the re-leasee; for if execution be not taken out, he is now barred of it; viz., the execution would be wrongful, since the judgment is the cause of the right to have execution; or the release may be pleaded in bar to a *sci. fa.* to revive the judgment. And if the re-leasee, or his land, &c., be in execution, he and it shall be discharged thereof by *audita querela*. ”

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rights and equities; this would be most unreasonable and unjust.

In the case of *Thompson v. Lack* (a), which was referred to in the course of the argument for another purpose, it is said by Wilde, C. J.:—"In order to give a retrospective effect to any statute, the words should be very clear." *Nova constitutio futuris formam imponere debet, non praeteritis*: 2 Inst. p. 292. The statute cannot, notwithstanding its recital, be considered as declaratory of the law, because it (the statute) is confined to releases of lands in Ireland, and the law was previously the same in both countries. I am of opinion that the Act is not retrospective, and is therefore inapplicable here; and I have come to that conclusion without considering that this suit was pending, and that in fact a decree was made upon the effect of this release before the Act was passed.

The exceptions to the report taken by the judgment creditors must therefore be overruled, and the former decree affirmed.

The next question arises on the exceptions taken by the defendants, the daughters and co-heiresses of William Henry Handcock, to the findings of the report as to two of the judgment creditors who had executed the release, but whose representative has since obtained judgments at law in proceedings by *scire facias* against the heirs of the conuzor, and the terretenants of the unsettled lands.—[His Lordship here referred to the writs of *scire facias*, and to the parties named in them, and the Sheriff's returns.]—The Master has reported that those judgments are subsisting charges upon the settled lands (Carrintrilly, &c.). But it has been contended that in consequence of the mode in which those defendants were made parties to the *scire facias*, the judgments of revivor cannot be considered as having the effect of setting up the original judgments as against the settled lands. Unquestionably they were individually parties to the record; they were made so as the co-heiresses of the conuzor, and they were in fact terretenants of lands which had belonged to him, although they were entitled to those lands by the settlement, and not by descent. It is, I think, plain that they could have pleaded this release, assuming that it had in law the effect which I have, in conformity with the opinion of the Court of Common Pleas,

(a) 3 M. Gr. & Sc. 551.

declared that it has. The case of *Everard v. Herne*, and many other cases, ending with *Thompson v. Lack* (*a*), show that a release to one party operating to the discharge of another person, not a party to it, may be pleaded by the latter.

But then it is said that those defendants were brought before the Court on the *scire facias* merely as co-heiresses, it being a *scire facias* under O'Neill's Act,\* and that they could not therefore plead this special matter. The cases of *Henry v. Jones* (*b*) and *Carroll v. Cooke* (*c*) were referred to. I think that the import of the cases is, that although on a *scire facias* under O'Neill's Act the proceeding is against the particular lands sought to be charged, it does not differ as to the plea which the heir may put in from a general *scire facias*, on which the terrenants of particular lands are returned as having been served; and on the authority of *Adams v. The Heir and Terrenants of Savage* (*d*), it was held in *Henry v. Jones* that on the *scire facias* in that case the heir, not being stated to be a terrenant, must be taken not to have had any interest in the lands charged, and could not plead a plea respecting them; but in both those cases it was expressly stated, that if the heir have any interest in the lands he ought to show it, and then protect that interest by any defence he may have. In *Henry v. Jones*, Bushe, C. J., observes:—"The heir *as such* is not liable on the judgment of his ancestor, but only as terrenant in respect of assets by descent. He is therefore called upon to show cause why a judgment should not be revived, because, as he may have lands, he may have an interest to resist the revival by showing that the judgment has been released or satisfied." And again:—"When therefore a plaintiff under O'Neill's Act specifies particular terrenants, he confines his remedy to them; and when he does not state the heir to be a terrenant, it must be taken that he is not one. If there be any interest of his own which the heir is entitled to protect by any plea, which interest does not appear upon the *scire facias*, he must show by his plea what that interest is, and in what character he resists the plain-

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(*a*) 3 M. Gr. & Sc. 540.

(*b*) Alc. & Nap. 14.

(*c*) 1 Jebb & Sy. 33.

(*d*) 2 Salk. 661.

\* 26 G. 3, c. 31 (*Ir.*)

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The remaining question is that of contribution. The case of *Averall v. Wade (c)* has been relied upon, and it is difficult to distinguish that case in principle from the present. It has been observed that there was in *Averall v. Wade* a covenant against incumbrances, which does not exist here; but there is here a covenant for quiet enjoyment, which may be worked out by throwing the plaintiff's judgment on the unsettled estates. The plaintiff had notice of the settlement at the time of taking his mortgage, and consequently had notice of the equitable claim founded on that settlement, and as a judgment creditor he cannot defeat that equitable claim. In *Averall v. Wade*, a party seised of several estates, and indebted by judgment, settled one of those estates for valuable consideration, and, as I have said, then entered into a covenant against incumbrances, and subsequently acknowledged other judgments. Sir Edward Sugden held that the prior judgments should be thrown altogether on the unsettled estates, and that the subsequent judgment creditors had not any equity to make the settled estate contribute. In *Hartley v. O'Flaherty (d)* (also relied upon), a debt due to the Crown, overriding the entire estate of the debtor, having been levied out of only one por-

(a) 1 Jebb & Sy. 42, n.

(b) Ibid.

(c) Ll. & G. temp. Sug. 252.

(d) Ll. & G. temp. Plunk. 208.

tion of it, which was vested in a mortgagee, it was held that the mortgagee was not entitled to contribution from purchasers of other portions of the estate of the Crown debtor, who derived title under a settlement for valuable consideration prior to the mortgage. Lord Plunket there says:—"I must consider this case exactly in the same way as if the debt which the plaintiff has paid had been a mortgage affecting the whole of the lands of the mortgagor. If afterwards the mortgagor sell a portion of his equity of redemption for valuable or good consideration, the entire residue undisposed of by him is applicable in the first instance to the discharge of the mortgage, and in ease of the *bona fide* purchaser; and it is contrary to every principle of justice to say that a person afterwards purchasing from that mortgagor shall be in a better situation than the mortgagor himself with respect to any of his rights; and I cannot see how the right of contribution differs in this respect from any other right. I should strike at the foundation on which the title to real property rests, if I were to adopt such a principle as one which is to govern this Court in regulating the rights of the several purchasers of lands where a sale is decreed for the discharge of a paramount incumbrance." Perhaps the Common Law doctrine has been overstepped in those cases; however, they have been more than once acted upon, and must be regarded as the settled law of this Court, and must, as I think, govern the present case. *Barnes v. Racster* (a) was cited, but I do not consider it as touching *Averall v. Wade*, and *Hartley v. O'Flaherty*. On the contrary, the decision was stated to be in conformity with them. It was a case of mortgages, which were merely specific, and not general, incumbrances.

Mr. *H. Martley* and Mr. *F. Fitzgerald* argued that the judgments vested in and revived by Sarah Egan should also in the first instance be thrown upon the unsettled estates.

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It would be going too far with the doctrine to hold that to be so. That would be a return to the principle of *Martin v. McCaus-*

(a) 1 Y. & Col., C. C. 403.

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1851. *land (a).* The primary legal effect of the release was to take the judgments off the settled estates and the unsettled estates. The settled estates had then a right of exoneration from the unsettled estates. But the judgments of Sarah Egan have been revived as against the settled estates, and are, as I have already declared and stated my reasons for thinking so, subsisting incumbrances as against them. Mr. H. Martley and Mr. F. Fitzgerald have now pressed upon me that the judgments, having been revived, are so revived with all their incidents, and therefore with a right in the defendants here to compel the judgment creditors to resort, in the first instance, to the unsettled estates; but I think that the effect of the revivor extends only to the particular lands against which the judgments were revived, and to the parties to the record, who, by their default in pleading the release at law, have pretermitted their opportunity of making that defence: *Keane v. Barry (b).*

*May 3, 5, 19.* The minutes of the decree, as drawn up by the Registrar, *Statement.* declared the judgment recovered by Walter Peter in 1824, and now vested in the plaintiff, to be a charge both upon the settled estates (Carrintrilly, &c.) and the unsettled estates (Cartron, &c.), and that the mortgage was a charge upon the latter estates, and directed a sale of both estates for payment of the sums respectively charged thereon. The minutes also declared that the plaintiff was entitled to the costs of the suit, so far as they regarded the above named judgment, in equal priority therewith, and so far as regarded his mortgage in equal priority therewith.

With respect to these minutes two motions were now made.

The first was made on behalf of the plaintiff. It was that the minutes might be varied by declaring him entitled to all his costs in equal priority with his first demand, viz., the judgment recovered against Walter Peter in 1824.

*Argument.*

Mr. Christian and Mr. Burroughs, for the plaintiff.

In England the practice is not to annex the costs of the plaintiff

(a) 3 Ir. Law Rep. 118.

(b) 8 Ir. Law Rep. 211.

to his incumbrance, but to permit him to take them in the first instance. In Ireland the Court has so far departed from the English practice as to rank the costs with the demand; but that rule has never been extended to such a division of the costs as has been made in this case; there is not any precedent for such a direction. There not being any fixed rule as yet here on the subject, this Court will follow the English practice, which is founded on the maxim, *Qui sentit commodum sentire debet et onus*. *Heighington v. Grant* (*a*) was also mentioned.

*Mr. Brewster*, for judgment creditors of 1826, opposed the motion.

*Mr. H. Martley* (with whom were *Mr. F. Fitzgerald* and *Mr. Owen*), on behalf of the defendants, the co-heiresses of William H. Handcock, claiming as tenants in tail under the settlement of 1824, also resisted the plaintiff's motion, and moved the second motion, viz., that the minutes of the decree should be varied by declaring that the plaintiff's demand, on foot of the judgment recovered by Walter Peter, and the plaintiff's costs, might be paid out of the unsettled estates in exoneration of the settled estates, and relying on *Hartley v. O'Flaherty* (*b*) and *Averall v. Wade* (*c*), insisted that the minutes were erroneously drawn up, and not in conformity with the opinion expressed by his Lordship on the question of exoneration in his judgment delivered on the 28th of February 1851 (*d*).

*Mr. Christian* and *Mr. Burroughs*, for the plaintiff.

The settled estate ought to contribute rateably to payment of the judgment. The general rule, both at law and in equity, where two properties, subject to a common charge, pass into different hands, is, that each property is liable rateably according to its value, and each has a right of contribution against the other; thus where a freehold estate is devised to one person, and a chattel real to another, each shall contribute to payment of bond debts of the testator: *Long v.*

(*a*) 1 Beav. 228.

(*b*) Beatty, 61; S. C. on appeal, Ll. & G. *temp. Plunk.* 208.

(*c*) Ll. & G. *temp. Sug.* 252. (*d*) Vide *supra*, pp. 474, 475.

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**Short (a).** So where a testator devises one estate and suffers another to descend: *Eyre v. Greer (b)*. So where a man grants a rent-charge out of all his lands, and sells to different purchasers, one purchaser, paying the rent, is entitled to contribution from the others: 1 *Eq. Cas. Ab.* pp. 113-26; *Cook v. Arundel (c)*; *Webber v. Smith (d)*; *Sir William Harbert's case (e)*. Purchasers from the conuzors of a recognizance are entitled to contribution, and to plead to a *scire facias* non-joinder of other purchasers. O'Neill's Act (26 G. 3, c. 31) took away that plea if the *scire facias* were framed under that Act, but saved the remedy for contribution, and thereby recognised the right to it. This right was also recognised and acted on in *Barnes v. Racster (f)*, and *Bugden v. Bignold (g)*. *Averall v. Wade (h)* is not an authority against the plaintiff. It merely decides that if estates A and B are subject to a common charge, and estate A is sold free from incumbrances, estate B becomes thereby the primary fund to pay the common charge, and a subsequent judgment creditor has not any equity to make estate A contribute to the common charge; but Sir Edward Sugden, in the *Treatise on Vendors (i)*, says that this does not touch the question between innocent purchasers; nor does it touch the case where the entire estate is sold or settled, and then another estate is purchased and sold or mortgaged. Besides, here there is not any covenant in the settlement against incumbrances; and even if there had been, it would have been a mere personal covenant, which would not have been enforced against a purchaser: *Deacon v. Smith (k)*; *Freemoult v. Dedire (l)*. The case of *Hartley v. O'Flaherty (m)*, so far as the decision of Sir Anthony Harte goes, is an authority for the plaintiff as deciding that all the estates of the debtor, including the settled estates, were liable to contribute rateably in ease of the plaintiff Hartley, who was a purchaser from

(a) 1 P. Wms. 403; S. C. 2 Vern. 756. (b) 2 Coll., C. C. 527.

(c) Hard. 87.

(d) 2 Vern. 103.

(e) 3 Rep. 11.

(f) 1 Y. & C., C. C. 401.

(g) 2 Y. & C., C. C. 377.

(h) Ll. & G. temp. Sug. 252.

(i) p. 1028.

(k) 3 Atk. 323, 326.

(l) 1 P. Wms. 429.

(m) Beatty, 61; S. C. Ll. & G. temp. Plunk. 208.

the debtor; but Sir Anthony Harte, in his judgment, said, that as between the eldest son of the debtor, and a purchaser from the eldest son, the last purchase must be first applicable. The decision of Lord Plunket merely carried out the opinion of Sir Anthony Harte in this respect, inasmuch as the party who appealed was a mortgagee, not of the original debtor, but of his eldest son. Here the defendants are in the same position as the eldest son of the debtor, who did not appeal from Sir Anthony Harte's decree. Moreover, in that case the plaintiff had permitted the judgment to be levied out of his estate, and then resorted to a Court of Equity. Here the plaintiff seeks no aid from equity, but merely asks not to be deprived of his legal rights. At law the rule is, that all the funds liable shall contribute rateably. In equity, as between persons in similar positions the rule is, equality is equity. The plaintiff is as fair a purchaser of the unsettled estate as the defendants are of the settled estate.

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With regard to the plaintiff's motion, I have no hesitation in saying that the decree, as at present drawn up, is in strict conformity with the justice of the case. Undoubtedly the rule in England is such as has been stated, and is considered there to be a just one. Here, however, it is deemed to be both a just and prudent course to discourage creditors from bringing suits into Court which may never realise any monies on foot of their demand. It appears to me that it would be a very unjust thing to give primarily out of the funds produced by a sale the costs of a bill which, if filed on foot of the second incumbrance alone, may have failed in realising a sufficient fund to reach that incumbrance at all. If a precedent does not already exist for a decree similar to the present in this respect, I feel no scruple in making one. The plaintiff's motion must therefore be refused.

In reference to the other motion, I am disposed to think that, should I eventually hold that those estates must be applied in payment of the plaintiff's judgment in exoneration of the settled estates, it will be a consequential direction that the costs of the suit, so far

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as regards the plaintiff's judgment, should be similarly provided for. It is unnecessary to make any special provision in this respect as to the costs of the suit so far as regards the plaintiff's mortgage, that being *puisne* to the marriage settlement. I shall look into my notes on the hearing before finally deciding the question of exoneration.

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On a subsequent day his Lordship disposed of the second motion as follows :—

**The LORD CHANCELLOR.**

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I have on a former occasion considered this case, and the arguments which I have heard upon the motion are substantially the same as those previously addressed to me. I am still of opinion that this case is ruled by that of *Hartley v. O'Flaherty*. There, as here, there was a common charge, a settlement of one estate, a subsequent purchase of another estate, and a mortgage of the estate so purchased ; and Lord Plunket decided that parties deriving under the settlement were not liable to contribute to payment of the common charge. That decision has been the basis of many subsequent decisions ; decrees and titles have been founded on it, so that it must now be regarded as the law of the Court. I have referred to the Registrar's notes of the case of *Whitehead v. Lord Carrick*, referred to by Lord Plunket (*a*), and find that the Registrar's book coincides with Lord Plunket's statement. It appears that the settlement in *Hartley v. O'Flaherty*, like the settlement in the present case, contained no covenant against incumbrances (*b*). But it appears to me that the covenant for quiet enjoyment is in substance of the same effect as a covenant against incumbrances. The case of *Barnes v. Racster*, which has been referred to, is very different from this case. There it is obvious that the mortgagee could not have any right against property not included in his mortgage ; but here Walter Peter's judgment became a charge on the unsettled estate before it was mortgaged to the plaintiff. Peter's judgment, before the plaintiff intervened, was a common charge on both the settled and

(*a*) *Ll. & G. temp. Plunk.* 219.

(*b*) *Ibid.* 225.

unsettled estates, and the plaintiff, as the last purchaser, must be the first to pay this common charge, notwithstanding that the unsettled estate was acquired subsequently to the settlement. I shall therefore grant the defendant's application, and the notes of the decree must be varied accordingly.

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On the above points as to costs and exoneration, the minutes of the decree eventually stood thus :—

Let the plaintiff be paid his costs in this cause as follows, viz., with his demand on foot of the judgment obtained by Walter Peter, and now vested in the plaintiff, save so far as relates to any costs occasioned by his claim on foot of his mortgage, as to which latter costs let the same be paid with the mortgage debt; and declare that the sum reported due to the plaintiff on foot of the said judgment, together with the first mentioned costs, are to be paid out of the produce of the sale of the unsettled estates in the pleadings mentioned, provided that the same be sufficient for the purpose; and in case the funds produced by such sale shall be insufficient for the purpose, then let the residue of said judgment debt and costs be raised by the sale of the settled estates of William Henry Handcock.

[The above is extracted from 2 *Reg. Lib. Gen.*, fol. 100, as corrected by the orders made on the motions, which will be found in the same book, fol. 228, 230, 304.]

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Although a sub-lease of church lands and tithes, containing a *toties quoties* covenant on the part of the sub-lessor to renew, does not contain a mutual covenant on the part of the sub-lessee to accept a renewal, the latter is not thereby prevented from filing a bill in equity to obtain a renewal.

The plaintiffs were the widow, children and trustees under the marriage settlement of the Rev. Allen Morgan, deceased; and the bill prayed that the defendant might be compelled specifically to perform his agreement with them touching a renewal of the two-third parts of the great and small tithes, mesne and glebe lands of the rectory of Mullinacuff and Crievrough, in the counties of Wicklow and Carlow, and that the plaintiffs should be declared entitled to have a new lease of those tithes and premises pursuant to the covenants for renewal contained in the several indentures of the 9th of December 1796, 25th of November 1812, 12th of December 1826, and the 20th of August 1838; and that same might be executed accordingly to the proper parties for the term of eighteen years, or such other as the Court should direct, plaintiffs undertaking first to pay unto the defendant one-fourth part of such fine, costs and charges as he had been put to in obtaining any renewal of said tithes from his lessors, the Dean and Chapter of Old Leighlin, subsequently to the 20th of August 1838.

Where there is a lease of church lands and tithes by an Ecclesiastical Corporation, and a sub-lease of part thereof by the first lessee, with a *toties quoties* covenant for renewal, on the

terms of the sub-lessee paying his proportion of such fines, costs and charges as the first lessee should have to pay in obtaining a renewal of his interest, and there is not a mutual covenant on the part of the sub-lessee to accept a renewal, delay on the part of the sub-lessee in taking out a renewal, and paying such proportion when required by notice so to do by the first lessee, at a time when he has been called upon by the Ecclesiastical Corporation to renew and pay the necessary fine, is a circumstance which will be taken into consideration by a Court of Equity on a bill filed by the sub-lessee for renewal.

*Sensible*—In such a case, if the sub-lease be put in settlement, notice by the sub-lessor to the tenant for life, under the settlement, will be sufficient, without giving notice also to the trustees of the settlement.

What will be sufficient laches to work a forfeiture of the right to a renewal of such a sub-lease, considered.

\* *Ex relatione ALFRED M'FARLAND, Esq.*

unto Thomas Gurley (along with three other denominations of tithes and glebe lands) the two third parts of the great and small tithes, mesne and glebe lands of that rectory. And by a sub-lease of the 9th of December 1796, Thomas Gurley granted unto the Rev. James Morgan, his executors, administrators and assigns, for twenty-one years, those tithes and premises only that are above specifically mentioned ; and Thomas Gurley, for himself, his executors, administrators and assigns, covenanted with James Morgan, his executors, administrators and assigns, that from time to time, as often as the former should obtain a renewal of those tithes and premises, he and they would make a new lease thereof to the latter, for the term to be mentioned in such renewal, except the last three years of same, James Morgan, his executors, administrators and assigns, first paying unto Thomas Gurley, his executors, administrators and assigns, one-fourth part of such fine, costs and charges as he or they should have paid or be put to in obtaining that renewal.

Thomas Gurley having afterwards procured a renewal of his lease from the Dean and Chapter, in pursuance of his covenant executed a new sub-lease of the particular tithes and premises in question to James Morgan, dated the 25th of November 1812, and died in 1816, whereupon his reversionary interest in those (and other) tithes and premises vested in his son (the defendant Walter Bagenal Gurley) ; who, having himself subsequently obtained a renewal of all of the same from his lessors, granted to James Morgan another sub-lease of his two-third parts by indenture of the 12th of December 1826.

By deed of the 5th of February 1827, made prior to the marriage of his son (the Rev. Allen Morgan), James Morgan assigned the premises in question to A B, and the plaintiff Harvey Dickenson, their executors, administrators and assigns, with benefit of the before mentioned covenant, to hold upon trust thereout, as often as should become necessary, to satisfy all fines and other expenses incident to procuring renewal leases, and to pay the balance of those tithes, &c., to Allen Morgan for life, and after his death, to suffer the plaintiff Margaret, in case she should survive him, to receive a jointure therefrom, with remainder in favour of the issue

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of the marriage. In 1836 the defendant obtained from the Dean and Chapter a third renewal of the several tithes and premises ; and the trustees under the deed of settlement, having applied for a renewal of their sub-lease of part, which he declined to grant, in the November of that year (along with Allen Morgan), filed a bill against him to enforce the specific performance of the covenant. That cause was not brought to a hearing, as the defendant eventually consented to execute the new lease to the trustees, and did so on the 20th of August 1838.

On the 27th of September 1841, a notice was served by the Dean and Chapter upon the defendant, requiring him to take out a fourth renewal of his tithes and glebe lands, on which, being unable of himself to make up the fine demanded (£463. 11s. 9d.), he caused a letter to be posted to Allen Morgan on the 24th of December 1841, apprising him of the notice, and requesting that a renewal of the sub-lease should be taken out, and in order to enable the defendant to make up the fine, which was specified in the letter, to pay his (Mr. Morgan's) proportion of it. The answer alleged that the defendant posted a similar letter to the trustees on the 30th of the same month ; but there was a question on the evidence as to whether that letter reached them. Nothing was then done in compliance with this request ; meanwhile the Dean and Chapter frequently repeated their application to the defendant, and threatened, if he did not accede, that they would not grant any renewal to him. Accordingly on the 13th of January 1843, the defendant (having borrowed part of the money) paid £564. 2s. 7d. as a fine to that Corporation (by this time the amount had increased) for granting him a renewal of the entire of the tithes and premises, and obtained same on the 13th of the following month. He also preserved his interest by paying a fine during each of several succeeding years, in conformity with a new regulation introduced by the Dean and Chapter.

In the meanwhile (24th of January 1843) the defendant caused a notice to be transmitted by post to Allen Morgan and the trustees, informing them of the payment, and of his being ready to renew the sub-lease, and calling upon them for their proportion of the fine,

stating further that if it were withheld he would insist on that as a forfeiture of their right to a new lease. On the 1st of February 1843 a letter to the same effect was forwarded by the defendant to Allen Morgan ; and on the 3rd the latter replied, "he was making every exertion to pay his proportion of the fine ;" but added, that the defendant's "interest under the Chapter must have been far beyond any idea he (Mr. Morgan) had formed of it, to induce the other to give so large, and, as it appeared to him, extravagant a fine ; and he was at a loss to conjecture upon what calculation the Chapter could have required such a sum."

Matters thus remained until July 1844, when Allen Morgan died, and in November 1844 his widow, assuming that the proportion of the fine, costs and charges to which the defendant was properly entitled in respect of the sub-lease only came to £141. 4s., tendered that sum by a person who died soon afterwards, and offered, as the bill averred, and the answer did not deny, to pay any further sum that should be shown to be due, but which tender the defendant refused to accept on the ground that, after his notice of the 24th of January 1843, he was no longer bound to renew, and that, as the answer stated, even if he were, the sum tendered was considerably less than what was due. On the 29th of January 1845 the trustees served the defendant with a notice (accompanied by a draft renewal) requiring him to execute a new lease under pain of legal proceedings, and to approve of the draft sent, or state his objections in writing ; and also to furnish them with a note of the amount of the fine, costs and charges which he had paid in relation thereto on procuring the last renewal of the particular tithes from the Dean and Chapter, one-fourth of which, with interest, the trustees undertook to pay thereupon. To this notice the defendant gave no reply ; and the bill alleged that on the 21st of April 1846 the trustees' solicitors wrote him a letter, of which, by accident, a perfect copy was not made ; but, as appeared from the statement of the remaining part, was to the same effect as the previous notice ; however, the answer denied its receipt.

Nothing further occurred until the latter end of 1846, when A B became affected in his mind, in consequence of which a suit  
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was instituted to have him removed from the office of trustee and the trust premises vested in another person in his stead, along with Harvey Dickenson the continuing trustee—arrangements which were not completed before the 22nd of May 1849; and on the 1st of August 1849 the engrossment of a new sub-lease, resembling that of the 20th of August 1838, was handed to the defendant for his signature, having been previously executed by the present trustees and Mrs. Morgan, accompanied by a tender of £350 to cover there-out whatever fine, costs, charges and interest the trustees ought to pay him, but the exact amount of which, as the bill averred, without denial in the answer, they were unable to learn, although they had used their utmost diligence, and made every exertion to calculate and discover the same. Along with this engrossment another notice was served upon the defendant, of the like nature as that of the 29th of January 1845, and containing an undertaking to pay such additional sum, if any, as might appear to be due on *his* calculation. But the defendant would not sign the engrossment, accept the tender, or comply with the notice; and under those circumstances the bill was filed on the 9th of October 1849, to enforce the covenant for renewal, which the defendant resisted, relying on the previous laches.

Argument.

Mr. *Greene*, Mr. *F. Fitzgerald* and Mr. *Tottenham*, for the plaintiff.

This is not the case of parties dealing with one who is seised in fee, but with one who himself holds a derivative interest under others, and must therefore give to the proper representatives of the sub-lease due notice of those steps which he may have taken with his lessors to secure the continuance of that intermediate interest, as well as of those which he means to take with respect to the estate of his undertenants, before he can charge them with neglect: *Lawless v. Grogan* (a): and that has not been done here. Neither the letters to Allen Morgan of the 24th of December 1841, and the 1st of February 1843, nor, in so far as he was concerned, the notice of the 24th of January 1843, can be considered as sufficient

(a) 1 Dr. & Wal. 53.

for this purpose; he was tenant for life only, not the person to pay the renewal fine, or take out the new lease; the trustees were bound to do so; the evidence fails to show that the letter, stated to have been sent to them on the 30th of January 1841, really was so; and although, by the notice of the 24th of January 1843, the defendant appears to have apprised them, together with Allen Morgan, of his having paid the £564. 2s. 7d. to the Dean and Chapter, and that he would rely on a forfeiture of right to the new lease unless they advanced their proportion of that sum, in doing so he assumed more than he was entitled to do; a forfeiture could not be had in that way. The trustees were merely interested in obtaining a renewal of the tithes and glebe lands of the rectory of Mullinacaff and Crievrough, whereas the £564. 2s. 7d. was paid by the defendant for his renewal with the Dean and Chapter generally, which comprised three other denominations of tithes and glebe lands; and upon the reasonable and proper construction of the covenant for renewal, the trustees were only to provide one-fourth of *such part of* the fine, costs and charges as he had incurred with respect to that single rectory: *Charlton v. Driver* (a); *Evans v. Walshe* (b); any demand exceeding that was unfounded. It was the defendant's duty to show precisely how the proportion was made up before he sought its payment; but no such information was afforded, and neither the trustees nor Allen Morgan could of themselves ascertain it; the defendant unjustifiably claimed a fourth of the entire fine, costs and charges payable by himself. Although he professed by the notice of January 1843 his readiness to renew the sub-lease on those terms being complied with, he had not then obtained a renewal of his own lease. Besides, such a notice ought to be personally served upon the parties before they can be charged with laches; it is not sufficient to post it or leave it at their house: *Johnston v. Warburton* (c).

Again, there was no stipulation in the sub-lease of 1796, or any subsequent renewal of it, binding the trustees to take out a new lease or limiting them, under pain of forfeiture, to any precise time

(a) 5 B. Moo. 59.

(b) 2 Sch. & Lef. 519.

(c) 2 Mol. 521.

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for the purpose if they did; though in the latter case they were to make a certain payment if, and so frequently as, they applied for the new lease. The covenant is on the part of the Gurleys simply; and it is, that from time to time, *as often* as they might obtain a renewal from the Dean and Chapter, they would make a new lease to their sub-lessees on payment of a premium; and by "*obtaining a renewal*" must be meant the actual taking out of a deed of renewal, which the defendant has not done since February 1843. But time can only be said to be of the essence of a contract where there is a mutual obligation; and the Court cannot import into the covenant restrictions not found in it, nor oblige the sub-tenants to apply for a new lease sooner than may be convenient to them. The course to which the defendant has now submitted of *renewing* (as he terms it) by *paying a fine each year*, cannot affect the construction of the covenant, or bind the plaintiff, who might have redress at law, were damages (as they would not be) a sufficient compensation for the breach of the covenant; therefore they must seek its specific performance here.

This is resisted however, and lapse of time relied on as having worked a forfeiture. The authorities that will probably be cited in support of this position are those where a person holding for three lives, with covenant for perpetual renewal by his landlord, expressly agreed in turn to pay the accruing fines and take out renewals within particular times, which therefore became important at law; and there was yet such a dereliction, after demand by the lessor, as excluded the idea of mere neglect and evidenced fraud; so that by bringing the case within the exception, the lessee was deprived of the benefit of the other provisions of the Tenancy Act,\* which, in the absence of that fraud, would have entitled him to relief in equity on making adequate compensation for the delay. In the present case the defendant has not pretended by his answer, and there is no ground for contending, that there was any such dereliction on the part of the plaintiffs as amounted to fraud; to constitute which there must have been, in the language of Lord Clare, "*gross, wilful, obstinate and contentious neglect:*" *Magrath*

\* 19 & 20 G. 3, c. 20.

v. *Muskerry* (a). So far from the existence of such neglect here, the tenders in November 1844, and August 1849, the notices of January 1845, and August 1849, and the letter of April 1846, evince a marked anxiety to obtain a new lease; but this the defendant prevented by demanding an excessive fine, rather than ascertain the right one, and furnish the data on which it was based. It was necessary in 1836 to file a bill against him before he would consent to execute a renewal then. The lunacy of the trustee in 1846, the pendency of proceedings for his removal, and the appointment of a successor between that period and May 1849, fully account for the present suit not having been sooner commenced. Even therefore if the statute should be held in its scope to extend to a sub-lease of church property, with a covenant on the lessor's part only, like the one now before the Court, and not to be confined to leases for lives with mutual covenants for renewal, to which, in terms at least, it alone applies, the plaintiffs ought not to be considered as at all affected by the exception it contains, and ought to have the benefit of the privilege it was meant to secure, which since the passing of the Act has been liberally upheld: *O'Neil v. Jones* (b). And if, on the other hand, the case do not rest on the Act in any way, but be determinable on the general principles of equity, their rights are equally strong.

The *Solicitor-General*, Mr. *Brewster* and Mr. *F. L. Smyth*, for the defendant.

As a renewal of the sub-lease was not taken out in 1843 pursuant to the notice of the 24th of January in that year, the right of the plaintiffs was then lost. If, as in the present instance, under-lessees permit their landlord to obtain a renewal of his lease, and decline to renew theirs, after being required to do so under pain of forfeiture, that forfeiture attaches, and no amount of future diligence can displace it—assuming, for argument's sake that there was such diligence here. With reference to the notice of the 24th of January 1843, the observations of the Court in *M'Donnell v. Bennett* (c)

(a) 1 Ridg. P. C. 494.

(b) 1 Ridg. P. C. 170.

(c) 4 Ir. Eq. Rep. 234.

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are very applicable:—"I think," said your Lordship, "it is important, in judging of the subsequent conduct of the tenant, to keep in mind that it does not occur merely after demand made by the landlord, but after the stringent demand made in this case, accompanied, as it has been, by a declaration that, from the expiration of the month, the landlord would hold himself absolved from all obligation to renew—in other words, that nothing the tenant should do thereafter would be of any avail." It has been argued, however, that a notice by a landlord calling upon his tenant to renew must be personally served; but the authority (*a*) cited for this position is a blind one, and cannot be followed at the present day, when the Legislature itself has so frequently recognised the service of notices by post; any mode of transmission will suffice, provided the letters reach the parties: and it is apparent from their subsequent acts that at least the notice of the 24th of January 1843 was received both by the trustees and Allen Morgan, though notice to the latter alone would have been enough: *Townley v. Bond* (*b*).

But so far from there having been due diligence afterwards, or at any time, there was great remissness throughout on the part of the plaintiffs. From December 1841 to the period of his death in July 1844, Allen Morgan contented himself with cavilling at the sum demanded as his proportion of the fine, and the trustees did nothing whatever. It was not until November 1844, by which time the forfeiture had accrued, that there was a tender of any kind, and that was an insufficient one; there was not any actual tender accompanying the notice of January 1845. The retired trustee may have been incompetent to act from the close of 1846 to May 1849, but previously to 1846 he was under no disability, and the plaintiff H. Dickenson has never been subject to any; yet it was not until August 1849 that the tender was made, on the strength of which the bill has been filed—facts and figures which evidence laches that ought to bar a renewal: *Fitzsimon v. Burton* (*c*); *Jackson v. Saunders* (*d*); *Butler v. The Earl of Por-*

(*a*) *Johnston v. Warburton*, supra.

(*b*) 4 Dr. & War. 240.

(*c*) See Finl. on Renewal, 294.

(*d*) 1 Sch. & Lef. 143; affirmed by the House of Lords, 2 Dow. P. C. 437.

*tarlington* (a). And if these be cases to which the Tenantry Act was expressly applicable, that of the plaintiffs does not stand in a better position; it comes within the mischief which the exception in the statute was designed to abate. Nor are the English authorities on the general question less favourable to the defendant: *Guest v. Homfrey* (b); *Heaphy v. Hill* (c); *Walker v. Jeffreys* (d). Then as to the plaintiffs having had any difficulty in ascertaining the share of the fine which they should have properly borne, the correct construction of the covenant on the under-lease is, that the sub-tenants were to pay one-fourth of the fine, costs and charges which the middleman might be put to in obtaining from time to time a renewal of his own immediate lease—of the indenture itself, and not of any particular portion of the tithes and glebe lands demised thereby.

And even if the facts were with them, the plaintiffs have mistaken their remedy. It is said indeed that although they are not bound by the covenant, the defendant is, because it is under seal on his part; and that the plaintiffs have therefore a right to resort to a Court of Equity to compel his performance of it; but if the covenant be not mutual there should be an end of the case, since to entitle parties to come into equity to enforce the specific execution of a contract, it must be mutual: and it will not be sufficient that it is under the seal of the person sought to be charged; the remedy is at law: 2 *Sug. Vend.* (e); *Hamilton v. Grant* (f).—[The LORD CHANCELLOR. Courts of Equity have frequently decreed a renewal at the instance of a tenant who was not himself bound to renew, and I think they will be found to have done so in a case like the present of a *tottes quoties* covenant.]—Still the complainants must apply within a reasonable time—which means such a period as may enable them to learn what they are to pay; they ought, as the phrase in such cases is, to be “prompt and eager,” and here especially, for as the undertenants, on performing the conditions on their part,

(a) 4 Ir. Eq. Rep. 1; S. C. 1 Dr. & War. 20.

(b) 5 Ves. 818.

(c) 2 Sim. & Stu. 29.

(d) 1 Hare, 347.

(e) p. 241.

(f) 3 Dow. P. C. 33.

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were to have had from time to time the term of twenty-one years [less by three], that should be mentioned in the last renewal from the Dean and Chapter, it must have been understood by the parties from the beginning that the sub-lessees were to renew with their lessor immediately or soon after his obtaining a renewal from the Corporation, otherwise the term would not be the same.

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*May 16.*

The LORD CHANCELLOR.

*Judgment:*

According to my present impression, the case of the plaintiffs is involved in great difficulty, arising from the lapse of time which they have permitted to occur before this suit was instituted. As to the mere consideration of the competency of a party to come into a Court of Equity to obtain the benefit of such a covenant as that now before me, I apprehend that there can be little question. Notwithstanding its form, and although in words it does not bind the tenant to renew, relief has been granted in similar cases. In *Revell v. Russell* (*a*) there was not any stipulation on the part of the sub-lessee to renew, and yet on his suit a renewal was decreed against the landlord (who was an immediate tenant under a Bishop's lease) without any contribution whatever from the sub-lessee, his lessor having covenanted that so often as he should obtain a renewal of his lease he would execute a new sub-lease without fine—a circumstance that does not present itself here. *Evans v. Walsh* (*b*) is a like case. Therefore on the abstract question I think that there cannot be any doubt.

But, in determining cases of this nature, regard must be had to all the circumstances, and in the present case I must consider what was the duty of the plaintiffs and those whom they represent towards a person situated as the defendant. He held under a corporate body which might renew with him or not, as it pleased; to have done so, was a matter of favour on its part, there was not any obligation upon it so to do. This being so, he sub-let to the party whom the plaintiffs now represent, with a *toties quoties* covenant, on the terms that the sub-lessee was to advance a certain proportion of whatever fine,

(*a*) 2 Bell & B. 280.(*b*) 2 Sch. & Lef. 519.

costs and charges the covenantor should be obliged to pay to the Dean and Chapter in case and so often as they might be induced to renew with him. It was on the faith of this undertaking that the covenant for renewal was inserted in the derivative lease. It is not therefore reasonable for the plaintiffs, who represent that under-tenant, to say now to the immediate tenant, "Whatever you may have done in renewing your lease, or whatever sum you may have paid, we will take a new lease when we think fit, and until then keep our money in our pockets." I can scarcely conceive a greater breach of faith than that of a person thus holding over and not contributing his share of the fine advanced by the immediate lessee, for their mutual benefit, to the head landlord, where the continuance of that lessee's own interest may depend upon the punctuality of the under-tenant. So much as to the general grounds. Next, with regard to the precise facts of this case.

So far back as the beginning of the year 1843 the parties were required to pay their proportion of the fine demanded from the defendant, and to take out a renewal of the sub-lease under pain of forfeiture.

Allen Morgan acknowledged the receipt of the letter of the 1st of February 1843, but did little more than express his surprise at the amount of that demand; it would be difficult to contend that notice to the tenant for life, even had it been confined to him, was not sufficient. So matters remained during the rest of that year, and the greater part of 1844, when the first tender was made, and refused, as the proper period was thought to have elapsed; and with the exception of a formal notice by way of application for, and the draft of, a renewal of the sub-lease, served on the defendant in January 1845 by the then trustees, and the second tender and notice in August 1849, nothing effective was done until the filing of the bill in October 1849.

Under these circumstances it appears to me that there would be great difficulty in acceding to the proposition that the plaintiffs are now entitled to demand a renewal, especially on considering the later cases on such subjects. Amongst others, *Walker v. Jeffreys* (*a*) has

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(a) 1 Hare, 347.

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been referred to, and by analogy at least it bears strongly on the present; for there the plaintiffs, having had notice in July 1833 that their right to a new lease of mines for twenty-one years was denied in consequence of breaches of covenant alleged to have been committed, remained inactive until January 1836; and an objection on the ground of acquiescence having been taken, Sir James Wigram, V. C., was strongly disposed to give every effect to it which the rules of the Court allowed; but it was not necessary that he should express any more decisive opinion on the point. I am disposed, however, to think that the principles recognised in those cases do apply here, where there is a delay of more than six years between the notice of 1843 and the institution of the suit.

My present impression therefore is, that I must dismiss the bill with costs, but I will mention the case again.

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May 19.

## The LORD CHANCELLOR.

Since this case was argued I have re-considered it, and remain of opinion that, having regard to the laches which has taken place, I cannot give relief to the plaintiffs, although I should be slow to cast any doubt upon their right by reason simply of the form of the covenant, one-sided though it be. I referred on the previous occasion, and I may allude once more, to the position of the parties as rendering it incumbent on the sub-tenants to come forward at the earliest moment to assist their landlord in making up the sum required by the Dean and Chapter by contributing their share of it; and it would be a grievous hardship upon him, after being obliged to raise the whole sum as he best could, to permit the sub-lessees after any considerable lapse of time, while enjoying in the interim the fruits of the existing tenure, to claim a new lease, having failed in the meantime to discharge their proportion of the common fine. What weighed most with me therefore, as it still does, was the delay that occurred after the notice in January 1843, that the defendant would not renew, but would insist on a forfeiture unless that proportion of the fine were paid. Whatever may be said as to the letter of December 1841, requesting a like payment, and that a new lease should be taken out,

nothing could be more express than the notice of January, and the letter of February 1843; and although the case does not come within any of those in which a precise period is fixed within which the tenants must renew, still, where parties are informed that their landlord will not, for some reason, perform his undertaking, it is their duty to apply to the Court with promptness if they dispute the sufficiency of that reason, and mean to rely on their rights.

1851.  
Chancery.  
MORGAN  
v.  
GURLEY.  
———  
Judgment.

In *Walker v. Jeffreys* (*a*) Vice-Chancellor Wigram, after enumerating several cases which show that where it had been decided that time might be essential in contracts relating to land, the tendency of the decisions, especially those of Sir John Leach, has been to hold persons concerned in such contracts bound, as in others, to regard time as material,\* proceeds to say:—"These cases appear to me so sound in principle that I certainly will not be the first to shake them. *Heaphy v. Hill* and *Watson v. Reid* are direct authorities, that if one of two parties concerned in a contract respecting lands gives the other notice that he does not hold himself bound to perform, and will not perform the contract between them; and the other contracting party, to whom the notice is given, makes no prompt assertion of his right to enforce the contract, equity will consider him as acquiescing in the notice, and abandoning any equitable right he might have had to enforce the contract, and will leave the parties to their remedies and liabilities at law." The decision in *Southcomb v. The Bishop of Exeter* (*b*) is to the same effect; unless therefore I were prepared to say that no interval of time, after an intimation like that conveyed by the notice of January 1843, should prejudice the parties to whom it was addressed, I should find it impossible to apply a different rule to the present case from that which properly prevailed in those which I have cited.

It is also to be borne in mind that one of the plaintiffs has been all along an acting trustee under the marriage settlement; and

(*a*) 1 Hare, 340.

(*b*) 6 Hare, 213.

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\* Vide *Reynolds v. Nelson* (6 Mad. 10); *Heaphy v. Hill* (*ubi supra*); *Watson v. Reid* (1 Russ. & M. 236); *Stewart v. Smith*, V. C. (16th Dec. 1824, not reported); *Cooper v. Emery* (Rolls, 17th July 1829, not reported); *Williams v. Edwards* (3 Sim. 70); *Lloyd v. Collett* (4 Bro. C. C. 469).

1851.

Chancery.MORGANv.CURLYK.Judgment.

although during a portion of the time that has elapsed there were proceedings pending for the appointment of a new trustee, that circumstance falls short of justifying the great delay in which the plaintiffs have indulged themselves. Under all the circumstances, I cannot compel the defendant to grant them a renewal. It has been argued that the plaintiffs, from the language of the covenant, had some difficulty in ascertaining their just proportion of the fine; but this is not propounded in the bill. I am not prepared to say that they may not perhaps obtain some benefit of the covenant in another form of proceeding instituted in a different Court; but I cannot assist them here after what has taken place. The bill must be dismissed, with costs.

Mr. *Greene* applied for an express reservation in the decree of the plaintiffs' right to proceed at law; but to this request his Lordship refused to accede.

1851.  
Chancery.

In the Matter of JOSHUA O'REILLY and EYRE COOTE  
O'REILLY, *Petitioner.*

Cause Petition under the 11th section of the Court of Chancery  
Regulation Act of 1850.

*June 4.*

THE main facts of this case are reported *supra*, p. 208.\* In compliance with the intimation of the LORD CHANCELLOR, notice of the petition had been served upon Frances O'Reilly, the donee of the power of appointment, her husband Philip O'Reilly, and her daughter Maria Bowler. William Pitt Bowler had made, since the former occasion upon which the case was before the Court, an additional affidavit, in which he raised all the objections to the petition which were raised in his former affidavit, and by his Counsel at the Bar. The affidavit, now filed, also alleged that Frances O'Reilly had exe-

By a petition presented under the 11th section of the Court of Chancery Regulation Act, it appeared that a person entitled to the interest of a legacy of £3000 during her life, with a power to appoint the principal amongst her

children (which power did not authorise an exclusive appointment), having three sons and a daughter, by deed in 1834 appointed that sum equally amongst her two younger sons and her daughter, and made a provision *aliounde* for her eldest son. Subsequently the daughter married, and the eldest son died in non-age.

The petition stated that the donee of the power having been advised that the appointment in 1834 was not a valid execution of the power, by deed made in 1850 appointed £1900 to one of the surviving sons, £1000 to the other, and £50 to the daughter, and left £50 unappointed. The petition was presented by the two surviving sons, and prayed that the appointment of 1834 should be declared invalid, and that the appointment of 1850 should be declared valid. Counsel appeared at the hearing for the daughter, and supported the prayer of the petition. Her husband, however, resisted the petition, and in his affidavit stated that his wife was, at the instigation of the donee, living separate from him, and that the donee had executed the latter appointment in order to defeat the former appointment, on faith of which he alleged that he had married the daughter; and the affidavit also alleged that the donee of the power was in collusion with her sons for the purpose of obtaining the fund, or a large portion of it, in payment of her own debts. There was not any evidence entered into on either side. The Court refused to make the declaration prayed for, and dismissed the petition, without prejudice, and without costs.

The jurisdiction created by the 11th section of the Court of Chancery Regulation Act is one to be exercised with the greatest possible caution. All facts material to the formation of a correct decision upon each case should be contained within the four corners of the petition.

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\* In that report, at p. 208, sixth line from the bottom, for "articles of 1804" read "articles of 1834;" and at p. 211, last line, for "several measures" read "similar measures."

1851.

Chancery.In re

O'REILLY.

Statement.

cuted the deed of November 1850 in order to defeat the deed of April 1834; and that if she should succeed in setting aside the last named deed, it was her intention to release her life interest in the dividends of the trust fund of £3000 in order to enable her sons Joshua and Eyre to receive the sums appointed to them by the deed of November 1850, upon the understanding that they should apply a considerable portion of those sums in payment of her private debts, which she, living separately from her husband, had contracted in respect of her separate estate. It also alleged that a case had, upon her part and that of the petitioners, been laid in the year 1847 before Counsel, as to how far it was possible for them to obtain the trust fund; and that Counsel gave it as his opinion that such an arrangement could not be carried out, owing to the rights of W. P. Bowler and his wife in the fund under the appointment in the deed of April 1834.

Argument.

The *Solicitor-General* and Mr. *Christian*, for the petitioners, relied on the arguments already adduced in support of the petition, and in addition to the authorities cited to show that where a former appointment is invalid the power may be again exercised, quoted *Jackson v. Jackson* (a). They observed also that there was not any evidence in support of the charge in Mr. Bowler's affidavit that the deed of November 1850 was in fraud of the power. They also insisted that it was not any longer open to him to contend against the petition as not falling within the 11th section of the Court of Chancery Regulation Act, the Court having already made its rule upon that point.

Mr. *Bernard Bagot* appeared for Maria Bowler in support of the prayer of the petition.

Mr. *Dwyer* appeared for Frances O'Reilly.

Mr. *Greene* and Mr. *William Smith*, for William Pitt Bowler, opposed the petition on the grounds put forward in his affidavit, and

(a) Dru. 91.

previously relied upon in his behalf. To show that the first deed of appointment was valid, they cited *Chadwick v. Doleman* (*a*); and they objected to separate Counsel being heard at all on behalf of the wife of Mr. Bowler, she not being *sui juris*.

1851.  
Chancery.  
In re  
O'REILLY.  
—  
Argument.

#### The LORD CHANCELLOR.

I am not sorry that this matter has been re-discussed, it being extremely important that there should be a right understanding of this Act, which, upon the first consideration of it, I thought was of a more comprehensive character than the contemporaneous legislation upon the same subject in England. Where two Acts of Parliament are passed within a few days of each other conversant about a similar procedure, but with considerable difference in expression and enactment existing between them, I concluded that the Legislature intended that they should be different in operation; and on consideration, the Irish Act, I thought, did not require that every special case presented under the 11th section of that Act should be presented in the names of, or with the concurrence of, all the parties interested in it. The words are:—"That it shall be lawful for any person (the direction of the Master in the case of persons under disability as hereinafter mentioned being first obtained) to present a petition to the Court of Chancery in Ireland, stating any document, facts or circumstances relating to any matter falling within the jurisdiction of the Court, by way of special case, and praying the opinion of the Court upon such special case; and it shall be lawful for the Court to give judgment upon such petition accordingly, and such judgment shall bind all such persons as the Court shall direct, and in default of such direction, then shall bind all such persons as presented the same." This section appeared to me to import a power of binding some persons besides those who present the petition; and it occurred to me that the concluding paragraph in the section, that "where the opinion of the Court is desired in any matter in which any infant, idiot, lunatic or married woman is interested, it shall be lawful for the Master of the Court in rotation to direct the presenting of such petition by way of special case on behalf of the infant, idiot,

*Judgment.*

(a) 2 Vern. 527.

1851.

*Chancery.*  
*In re*  
O'REILLY.*Judgment.*

lunatic, or married woman, and such direction of the Master shall be conclusive to all intents and purposes," does not imply that in every case in which persons under disability are interested the concurrence of the Master is necessary previously to the presentation of a petition by other parties interested who are not under disability. Perhaps the section is not as clear as it might be, and it may in this respect require further consideration or amendment; but I think it is at all events so expressed as to warrant me in saying that the general enactment contained in it would be paralysed if it were to be held that all persons interested in the subject of the petition should concur in presenting it, and that the sanction of the Master is essential in every case in which persons under incapacity are concerned. That appears to me to be too narrow a construction.

Accordingly I thought that the petition should be entertained by the Court as one falling within the 11th section of the statute; but before entering upon its merits I required that notice should be served upon all parties interested.

That notice having been served, the question now arises whether the state of facts warrants a declaration of the opinion of the Court as prayed by the petition? Before entering into, and in reference to, that question, I may in the first instance observe that whatever may be the true construction of the 11th section in reference to the preceding observations, the jurisdiction created by it is one which ought to be exercised with the utmost possible caution; that the Court should insist upon having before it all the materials essential to the formation of a correct opinion upon each case; and further, that all the facts must be contained within the four corners of the petition, because it is upon the petition itself that the Court is to decide.

What would be the proper course of proceeding in the event of there being a controversy respecting disputed facts, in a case otherwise safe to be dealt with under this section, I am not now going to say; but where such a dispute exists, and the petition is silent as to the facts which are disclosed upon affidavits in answer, which facts appear to be material, and the Court is not satisfied that it is dealing with the real truth of the case, or has the means of ascertaining it, with all the disposition which I feel to give a large and

liberal construction to this statute in all its parts, I should hesitate to make any declaration of rights in such a case. I should adopt a dangerous course if I were to decide upon facts not contained within or alluded to by the petition.

With regard to the present case, I think it one in which it would be perilous for the Court now to intermeddle. It is notorious that many questions may arise upon a single exercise of a power. Here there are questions upon conflicting executions of the same power, and I have been called upon to declare that the first deed of appointment is invalid, and that the second one is valid. It is alleged in the petition that the first deed is invalid, because it passed over one of the objects of the power and gave away the entire fund; and that being invalid, the donee was at liberty to re-exercise the power, and that he, having so re-exercised it, leaving unappointed a nominal fund for future children, I am bound to declare that execution valid.

By the first deed, viz., that of 1834, Frances O'Reilly appointed the whole fund to her two younger sons (the petitioners Joshua and Eyre O'Reilly), and her daughter Maria O'Reilly, afterwards Mrs. Bowler, in equal shares, and then she proceeded to make a provision for the disappointed object of the power, her eldest son Henry O'Reilly, by agreeing to convey to trustees certain real estates upon trust after her death, and that of her husband, for Henry O'Reilly for life, with remainder to his first and every other son in tail male, remainder over. Henry O'Reilly died in his non-age; so far therefore as he was concerned he cannot be supposed to have elected to take under that deed or the reverse, or in any way to have acted under it. But that may not be so with other parties. It said that the donee of the power has put an end to all questions of election, because she has re-exercised the power. Am I then to declare this new execution of the power valid? Upon the case as made by the petition, it would perhaps be difficult to say that this second execution is not valid. But when the circumstances under which this second deed was executed, the nature of it, and the affidavits made by Mr. Bowler, are considered, would it be safe for me to say that it was a valid exercise of the power of appointment so as to bind all the parties before me? I confess that I shrink from making a pre-

1851.  
*Chancery.*  
*In re*  
O'REILLY.  
*Judgment.*

1851.

Chancery.

In re

O'REILLY.

Judgment.

cedent so dangerous. If I hesitate about affirming this second deed, I must hesitate about disaffirming the first, because if the second turn out to be void or fraudulent, the result might be to re-establish the first. I do not however say that such will be the case.

What answer might be given to the allegation of Mr. Bowler that the second appointment is fraudulent, I do not know. The case wears at least a suspicious aspect in that respect. I cannot treat the case as at present ripe for adjudication. It is mere prospective litigation until the Court is called upon to distribute the fund. The most prudent course for me to adopt is to dismiss the petition, without prejudice to such other or further proceedings as the parties may be advised to take. The section is a novel one, and the Court gave some encouragement to the petitioners in the first instance; the dismissal therefore must be without costs.

1851.  
Chancery.

In the Matter of SARAH CAMPBELL, Widow ;  
and of ANNE CAMPBELL, WILLIAM CAMP-  
BELL and MICHAEL CAMPBELL, Infants,  
by the said SARAH CAMPBELL their next  
friend, . . . . . *Petitioners;*  
MARY ANNE CAMPBELL, . . . . . *Respondent.\**

June 24.

THE petition in this cause was presented under the 11th section of the Chancery Regulation Act (13 & 14 Vic. c. 89), and prayed that the Court might declare its opinion and judgment on the several matters in the petition submitted to it, and that such judgment and opinion might be declared binding on the respondent Mary Anne Campbell and various other persons therein named, and on the petitioners ; or that the Court would make such other or further orders in the premises as to it should seem meet.

The petition stated that Samuel Campbell was at the time of his *viz.*, to permit and suffer his daughter during her life to receive an annuity of £100 to be issuing and payable out of all and every *other* his freehold estate or estates situate (here the houses and lands above named were mentioned) to her separate use (and without power to alien or mortgage it), and after her decease the annuity was to stand to the heirs of her body lawfully issuing, in such shares as she should by will appoint, and in default of appointment then to her said children share and share alike.

And the testator directed that £50 per annum should be applied in the maintenance of his daughter until she attained twenty-one or married, and that upon either of those events the trustees were to assign the annuity of £100, and all interest and dividends due thereon, and all securities wherein the same should be placed out or invested, to her for her own sole use and benefit absolutely for ever, with the usual powers of distress and entry upon the devised premises, and every or any part thereof. After a bequest of certain plate and household furniture to his daughter, and of a small annuity to another person, the will contained this clause :— “ and in further trust that in case my said daughter shall happen to die before she attain twenty-one and unmarried, I give, devise and bequeath said annuity of £100, and all and every *other* my freehold estates wheresoever as aforesaid unto my brother E. C., for and during the term of his natural life, and from and immediately after his decease unto and to the use of his right heirs for ever, in such manner as by his last will he should direct, limit and appoint,” and the testator bequeathed all his personal estate subject to his debts, to E. C. The testator’s daughter survived him and attained twenty-one. Upon a petition presented under the 11th section of the Court of Chancery Regulation Act on behalf of the children and devisees of E. C., who died almost immediately after his brother the testator, the Court was of opinion that upon the context of the will, the words of contingency “ in case my daughter shall happen to die before she attain twenty-one or marriage,” must be confined to the annuity of £100, and that accordingly E. C. and his children took estates to the exclusion of the testator’s daughter in the freehold property of the testator immediately upon his death ; but the case was sent for the opinion of a Court of Law.

\* *Ex relatione ALFRED M'FARLAND, Esq.*

1851.

Chancery.CAMPBELLv.CAMPBELL.Statement.

death seised of an estate of freehold in divers houses and lands in Shankill, Peter's-hill and North-street, in Belfast, and held by him under leases for lives with covenants for perpetual renewal, and that the profit rent amounted to upwards of £300 per annum, but that he was not at that time seised of any other freehold estate.

That he made and published his last will on the 21st of August 1844, and thereby gave, devised and bequeathed unto his brother Edward Campbell, and George Law, and the survivor of them, and the heirs of such survivor, all his freehold messuages, lands, tenements and hereditaments whatsoever and wheresoever, to hold to them and their heirs upon the uses and trusts, for the intents and purposes, and subject to the powers, provisoies, limitations and declarations thereafter expressed ; that is to say, that his said trustees or trustee should permit and suffer his daughter (the respondent), during the term of her natural life, to receive and take to her own use and benefit one clear yearly annuity, rentcharge or sum of £100 sterling, to be issuing and payable out of all and every *other* his freehold estate or estates, situate in Shankill, Peter's-hill, and North-street, which he had surrendered to the use of his will, being (as the petition stated, and was admitted on the part of the respondent) the premises thereinbefore referred to ; the said annuity or rentcharge to be paid to her half-yearly as therein specified (the first payment to begin and be made payable on the first gale day next after his decease), to be free and clear of all charges and impositions thereon, or otherwise howsoever, and not to be in any manner subject or liable to the debts, contracts, or engagements, bankruptcy, or insolvency, of any husband she should or might thereafter marry, but to stand and enure to her own sole and separate use and benefit, and her own receipt alone to be a good and sufficient discharge for the same, notwithstanding any coverture she might be under ; and she was not to be permitted, nor to have any power to set, sell, assign, mortgage, alien, or transfer it, but it was to stand and remain to her own sole use as aforesaid ; and after her decease, to the heirs of her body lawfully issuing, in such manner, shares and proportions as she should by her last will direct, limit

and appoint, and in default of such appointment or disposition, then to her said children share and share alike; and the testator ordered and directed his said trustees and the survivor of them to pay and apply the sum of £50 a-year to and for the maintenance and education of his said daughter in such manner as they should think fit, and until she should attain the age of twenty-one years, or be married; and upon her attaining that age or day of marriage, which should first happen, to pay, assign, and set over the said annuity or rentcharge of £100, and all interest and dividends due thereon, and produce thereof, and all securities wherein the same should be placed out or invested, to her for her own sole use and benefit absolutely for ever, with the usual power of distress and entry, "upon the said freehold estate or estates, houses, messuages and tenements, and every or any part thereof," if the rentcharge should fall into arrear. He also gave to his daughter all his plate and plated ware, together with whatsoever part of his household furniture she might think fit to select for herself; and the will, after conferring an annuity of £6 upon one Eliza Fulton, contained the following clause:—"And in further trust that in case my said daughter Mary Anne Campbell should happen to die before she attains the age of twenty-one years, and unmarried, I give, devise and bequeath said annuity, yearly rentcharge, or sum of £100 sterling, and all and every *other* my freehold estates wheresoever as aforesaid," unto my brother Edward Campbell for and during the term of his natural life, and from and immediately after his decease unto and to the use of his right heirs for ever, in such manner as he should by his last will direct, limit, and appoint;" and the testator nominated his said brother guardian of his daughter during her minority; and he ordered that all his just debts, funeral and testamentary expenses might, by his executors thereinafter named, be paid and discharged out of his personal estate: all the rest, residue and remainder of his personal estate, of what nature soever, he gave and bequeathed to the said Edward Campbell, and he appointed him and George Law, and his daughter, executors and executrix of that his will.

That the testator, Samuel Campbell, died on the 12th of August 1850, without having revoked or altered his will, survived by

1851.  
Chancery.  
CAMPBELL  
v.  
CAMPBELL.  
Statement.

1851.      Edward Campbell and George Law, the respondent and Eliza Fulton, and leaving the respondent his heiress-at-law.  
Chancery.  
CAMPBELL      That the respondent was, at the time of her father's death, an infant under twenty-one years, but attained that age on the 16th of  
v.  
CAMPBELL.      January 1851.  
Statement.

That Edward Campbell made his last will on the 25th of May 1849, and thereby devised all the real property which might belong to him at his decease to trustees, upon certain trusts for the benefit of his wife and children, the petitioners.

That Edward Campbell died on the 29th of August 1850, without having revoked or altered his will.

That he was at the time of his death seised of an estate of freehold, for lives, with covenant for perpetual renewal, in certain properties situate in Hill-street, Townsend-street and Dayton-place, in the said town of Belfast, other than and besides the real estate which, as the petitioners contended, according to the true construction of the will of Samuel Campbell, were devised by him to Edward absolutely, or to him for life, with remainder to the petitioners in fee, or for some absolute interest.

That owing to the legal estate in the lands, devised by Samuel Campbell, being vested in George Law, the petitioners were unable to proceed at law, by ejectment or otherwise, in order to assert their rights under the will of Samuel; and were therefore desirous of obtaining the opinion of this Court whether Edward Campbell or they took any and what estate and interest in the lands and real estates devised by Samuel Campbell under his will; and they were also desirous of obtaining the opinion of this Court as to the nature of the estate and interest to which they were respectively entitled therein under the will of Edward Campbell, in case the Court should be of opinion that he took any estate therein capable of being disposed of by him by devise; and also what estate or interest the petitioners were respectively entitled unto in the real estates to which Edward Campbell was entitled at the time of his decease, other than the estate and interest, if any, of him (Edward) in the estates devised by Samuel.\*

\* This part of the case, in which the respondent had no interest, was not discussed.

Mr. *Greene* and Mr. *May*, for the petitioners.

Upon the true construction of the will of Samuel Campbell, the gift of his freehold estate amounts, not to a mere executory limitation or devise, but to an immediate beneficial devise to the testator's brother Edward Campbell and his heirs absolutely amongst them; and the preceding terms of contingency, "in case my said daughter Mary Anne Campbell shall happen to die before she attain the age of twenty-one years and unmarried," are to be applied simply to the rentcharge of £100 a-year, and not to the real estate also. The will provides the rentcharge as a certain provision for her; she is to enjoy it during her life as separate and inalienable estate, and after her death it is to go to the heirs of her body as she may appoint, and in default of appointment then to her children equally—thus putting it in settlement for her and their benefit; and beyond this nothing was given to her or them except the plate, and such part of the household furniture as she might select; while everything else, the estate in question and residue of the personality, were bequeathed to Edward Campbell and his family as heirs absolutely. This view of the will is consistent with all its parts; any other interpretation would give rise to repugnancies, and be contrary to the probabilities. Counsel dwelt upon the various clauses in the will in support of their argument, especially on that by which the rentcharge was made payable out of the same estate to which the respondent claimed to be also entitled, and cited *Graves v. Hicks* (a); *Bradford v. Foley* (b); *Horton v. Whittaker* (c); *Simmons v. Rudall* (d); *Forbes v. Moffatt* (e); *Napper v. Sanders* (f); *Boon v. Cornforth* (g); *Doe v. Brazier* (h); *Doe v. Allcock* (i); *Simpson v. Hornsby* (k).

(a) 6 Sim. 391.

(b) Doug. R. 63.

(c) 1 T. R. 346.

(d) 1 Sim. N. S. 115.

(e) 18 Ves. 384.

(f) H ut. R. 118.

(g) 2 Ves. sen. 276.

(h) 5 B. & A. 64.

(i) 1 B. & A. 137.

(k) Prec. in Ch. 439, and referred to by Bayley, J., in *The King v. The Inhabitants of Ringstead* (9 B. & C. 228; S. C. 4 M. & Ry. 67).

1851.  
Chancery.  
CAMPBELL  
v.  
CAMPBELL.  
Argument.

1851.

Chancery.

CAMPBELL

v.

CAMPBELL.

Argument.

Mr. Serjeant *Christian*, Mr. *F. Fitzgerald* and Mr. *Pilkington*, for the respondent, did not claim the freehold estate on her behalf as a devisee by implication, but contended that, in addition to the rentcharge which Miss Campbell took under her father's will, she was entitled to the estate itself as his heiress-at-law by descent; and it lay upon the petitioners to show there was any thing in the will to disinherit her; but they had failed in doing so; on the contrary, the words of contingency, to which reference had been made, extended equally to the estate and the rentcharge, and had been defeated, to her advantage, by her attaining age; the intention was that she should take the estate, to be dealt with as she pleased, subject only to make good the rentcharge, which was strictly secured by the will itself in her own favour, and that of her children after her. The testator could not have meant to deprive his only child of the freeholds in order to confer them on his brother; nor was the construction of his will, contended for by the respondent, inconsistent with any of its provisions; and should the estate be afterwards aliened to a third party, the clause of distress might be turned to good account. Counsel cited *The King v. The Inhabitants of Ringstead* (*a*); *1 Jarm. on Wills*, p. 744; *Shuldam v. Smith*, stated *ibid*, p. 746 (*b*); *Aspinall v. Petvin* (*c*); *Davenport v. Coltman* (*d*); *Hall v. Hill* (*e*); and distinguished the present case from those relied on for the petitioners.

June 24.

## The LORD CHANCELLOR.

Judgment.

This case has been well and ably spoken to, and involves some questions which, probably, I ought not to dispose of without the aid of a Court of Law. The question is whether, under the ultimate limitation in the will of Samuel Campbell, his brother Edward Campbell took more, if any part, of the testator's freehold property than a contingent executory estate, not vesting, unless the respondent should have died before twenty-one or marriage? It is

(*a*) 9 B. & C. 219, 233.(*b*) 6 Dow. 22.(*c*) 1 S. & S. 544.(*d*) 9 M. & W. 481; S. C. 12 Sim. 588.(*e*) 1 Dr. & War. 94.

contended on the part of the petitioners (Edward's children and widow) that he took an immediate estate, subject to the rentcharge or annuity of £100 given to the respondent. On the other hand, it is argued for her that, as heiress-at-law of the estate, she took the entire estate.

Guiding myself by the rules which have been adopted on questions of this kind, I must construe the will so as best to effectuate the testator's intention, as indicated by the instrument itself. On the part of the respondent it is rightly contended that she, being heiress-at-law, is entitled to everything not given to some other person; and according to the established rules of construction there must, in order to defeat that title, not only be an intention shown to exclude her, but words giving the property to some one else. This, however, it is admitted, may be done either by express devise or necessary implication. That necessary implication is described in *The King v. The Inhabitants of Ringstead* (a) to mean such a strong probability, that an intention to the contrary cannot be supposed. The question here, I think, is, on the whole construction of the will, whether, having regard to its language, there is, if not an express devise, a devise by necessary implication?

It is true that, on the plain grammatical construction of the words, the devise before me would not of itself confer any thing but an executory interest, to begin in the event of the respondent's death, under age or unmarried; thereupon the estate is given over; and if those words are to be construed grammatically, I believe it is conceded that then it would pass accordingly, and not otherwise.— [His Lordship here read the terms of the devise.]—*The King v. The Inhabitants of Ringstead* may be taken as a clear authority that such words, without more, could not give an estate by immediate devise, the words there being almost the same as here. I apprehend then that these expressions, standing alone, could not amount to more than an executory devise. The question is, whether the Court is bound to adhere to that construction, having regard to the other parts of this will? or was it not plainly the intention of Samuel Campbell that his daughter should take no more than the rentcharge

1851.  
*Chancery.*  
 CAMPBELL  
 v.  
 CAMPBELL.  
 Judgment.

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Chancery.

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CAMPBELL.

Judgment.

if she died under age and unmarried? As to the effect merely of a gift of an annuity to his heir-at-law, something similar occurred in *Habergham v. Vincent* (*a*). The Court there held that the testator's son took all the beneficial interest in the real estate, although an annuity had been given to him out of it. In that case Mr. Justice Wilson uses very strong expressions to show what the language must be to disinherit an heir-at-law. He observes:— “As far as the trust estate is disposed of by the will, so far it is disposed of; as far as it is not, so far it is undisposed of; and the trustee cannot say the first words, giving all to him, would pass both the legal and equitable interest, and therefore that it rests with the heir to show that the equitable interest is taken out of the trustee by some express disposition. It is enough for the heir to say it is not given to any one else, and it rests with the trustee to show, from other parts of the will, that the equitable interest, or part of it, is given to him. He claims under the will, and can only claim under the will, and must therefore show that it is given to him by the will. The heir need not show that; but it is enough if it do not appear to be given to any one else.” It may therefore, I think, be said that the mere gift of an annuity to an heir-at-law, although indicating an intention that he should take nothing else, would not be of itself enough without something more. The first question then is, is the intention on this will sufficiently clear that the respondent should take nothing beyond the rent-charge? And it does appear to me to be plain that what the testator did intend to give his daughter was that charge, and no more.—[His Lordship here read the bequest or trust creating it, and proceeded]:—He then gives express directions regarding it, and a clause of distress and entry upon the very lands which, according to the argument used for her, would descend to herself, and she might be distraining on her own lands. There can hardly be a stronger indication of intention than this, that she was not to have any thing more. It has been argued forcibly that the tenure of this annuity may be consistent with the descent of the land upon her, because it is to be for her separate use, and inalienable by her; it was also to

(*a*) 2 Ves. Jun. 204.

accumulate until she reached majority, or married, while there is no such direction as to the rents of the estate itself. All this is very strong, and constitutes one of the difficulties of the case, of which I am not insensible. But notwithstanding that, looking at the entire will, and bearing in mind the observations made upon it by Mr. May in the course of his clear argument, I think the intention in giving the annuity is so strongly indicated as to countervail the other.

Supposing that to be so, is there enough to constitute a gift over within the authorities, that you must not merely show the intention to disinherit an heir, but that the estate has been given to another? It is laid down by Mr. Justice Bayley, in *The King v. The Inhabitants of Ringstead*, that, "for the purpose of furthering the manifest intention of the testator, there is no doubt that general words, which, taken in their ordinary grammatical sense, apply to all the property devised, may be taken distributively; and that *reddendo singula singulis*, they may be applied to that part of the property only to which they appear by the context to be applicable, so as to suffer the residue of the property, to which, in their grammatical sense, they would apply, to pass immediately:" and I do not think this doctrine impeached, but rather confirmed, by the conclusion at which the Court arrived in that case, in which the same learned Judge takes care to distinguish it from the decision in *Doe v. Brazier* and others, that have been relied on for the petitioners. He concludes his judgment thus:—"The ground of that decision was, that it was apparent, on the face of the will, that although the testator intended to give Charles Brazier a life estate in one house only, he yet intended to dispose of his property in the other houses, which latter intention could only be effected by giving to the nephews and niece an immediate interest in the other houses; and therefore the Court, in order to effect the manifest intention of the testator, was compelled to give to the words a construction different from that which belonged to them in their ordinary grammatical sense. In the present case there is nothing in the will to show that the testator intended to give his grandchildren, upon his death, an immediate interest in the property devised, or that he meant to

1851.  
Chancery.  
CAMPBELL  
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\_\_\_\_\_  
*Judgment.*

1851.  
Chancery.

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v.

CAMPBELL.

Judgment.

disinherit the heir-at-law ; and that being the case, we must construe the words of the will in their ordinary grammatical sense."

Testing the present case by that, I think, having regard to the terms of Samuel Campbell's will, if a manifest intention to give an immediate estate to Edward Campbell does not appear, there is sufficient to show that the testator meant to disinherit the heiress-at-law, and to warrant me in construing the words distributively. The case before Lord Cranworth (*a*) was too plain for argument. Upon all these grounds, although the case is one of difficulty, I conceive I am warranted in putting a construction on the parol words of the devise, that the respondent is to take nothing save the annuity ; but if it be desired on her part to send the case to a Court of Law for its opinion, I shall be happy to do so.

[Time was given to the respondent's solicitor to communicate with his client ; and upon Mr. Serjeant *Christian* mentioning on a subsequent day that the opinion of a Court of Law was desired by her, it was directed accordingly.]

3 *Reg. Lib. Gen. fol.* 146, 148, 204.

(*a*) *Simmons v. Rudall*, ubi sup.

1851.  
Chancery.

## HAMILTON v. NAGLE.

May 27.  
June 26.

JAMES HAMILTON, claiming as a mortgagee for a sum of £30,000, filed his bill in this cause in the year 1847, praying a foreclosure and sale, and he obtained a receiver in 1848. Certain tenants, claiming under leases, all prior to the date of the appointment of the receiver, and to the institution of the suit in the year 1850, obtained an order of reference to the Master as to the propriety of an abatement being made by the Court in respect of arrears of rent then due. Their notice of motion also aimed at a prospective reduction of rent, but his Honour the Master of the Rolls did not think that he had jurisdiction to reduce the rents prospectively, and limited his order of reference to past arrears. Under that order the tenants obtained an abatement of arrears nearly to the extent of £420. It appeared that the estates would fall short of discharging the amount of the plaintiff's mortgage. The tenants having again applied for, and obtained from his Honour, an order of reference as to the granting a relinquishment of arrears due, notice of appeal was served on behalf of the plaintiff and of the owner of the estates, on the ground that the Court had not jurisdiction to remit arrears of rent in such a case.

Where tenants hold under leases of a date prior to that of the appointment of a receiver in a foreclosure suit over the lands which they hold, the Court has not jurisdiction either to remit arrears or to grant a prospective abatement of the rents, which by their leases the tenants are bound to pay, unless the owner of the lands, and the plaintiff, and other parties interested in the rents, consent to such remission or abatement; *secus autem* in the case of the estate of an infant or lunatic under the control of the Court.

Mr. Gresson, for the plaintiff, cited in support of the appeal *Woodward v. Woodward* (a); *Robinson v. Shearer* (b); *Morrow v. Sausse* (c); *Crofts v. Poe* (d); *Evans v. Taylor* (e); *Davis v. Cotter* (f); *Fitzgibbon v. Flynn* (g); *Hutchins v. Hutchins* (h), and *Byrne v. Kelly* (i).

Argument.

- (a) Hay. & Jo. 26.
- (c) 8 Ir. Eq. Rep. 519.
- (e) S. & Sc. 681.
- (g) S. & Sc. 687.

- (b) Hay. & Jo. 799.
- (d) 3 Law Rec. N. S. 99.
- (f) S. & Sc. 685.
- (h) *Supra*, 146.

(i) 3 Ir. Jur. 177.

1851.

Chancery.

HAMILTON

v.

KAGLE.

Argument.

Mr. *Deasy* and Mr. *Chatterton*, for the tenants, in support of the order at the Rolls, argued that nothing could be more pernicious to the estate than to keep the tenants under an accumulation of arrears, and that rents had frequently been remitted by the Court on the application of the tenants, although the Court may have objected to do so at the instance of the receiver. On their opposition also the **LORD CHANCELLOR** refused to hear Mr. *Sherlock*, for the owner of the mortgaged lands, in support of the appeal, because he had not served a separate notice of motion by way of appeal.

#### The **LORD CHANCELLOR.**

June 26.

Judgment.

This motion came before me by way of appeal from the order of his Honour the Master of the Rolls, whereby it was referred to the Master in this cause to inquire and report whether any remission ought to be made to certain tenants in regard to the arrears of rent now due by them. This appeal is made substantially on behalf of the plaintiff in the cause, who is stated to have an interest in the question; and it was stated, and not controverted, that the inheritor had no interest whatsoever. The question is, whether this Court has jurisdiction against the opposition of the party interested in the estate to interfere with those arrears by way of remission? or, in other words, whether, because a receiver has been appointed in a cause constituted as this is, the Court may so far liberate the tenants from the obligations contained in their leases as to discharge those tenants from the arrears of rent due by them when those leases are paramount to the appointment of a receiver in the suit? It was argued at the Bar that a distinction exists, and has been taken, between a remission of arrears and a prospective abatement of rent; and that although the Court has not jurisdiction to abate the rent, which is to accrue *in futuro*, yet it has ample power to remit arrears of rent already due. Since the argument of this case I have looked into the authorities on the subject, and have read the elaborate judgment of Master Murphy, which seems to be very fully reported in the 3rd volume of the *Irish Jurist*, p. 177, and in which every thing of importance, either as regards the authorities or the practice of the Court, is collected.

Upon full consideration of those authorities, I have been reluctantly compelled to come to the conclusion that the Court has not jurisdiction to interfere with the rents in the manner in which it is now asked by the tenants to do. That it is frequently advantageous to all parties that arrears should be remitted, has often come under my cognizance in cases where minors and lunatics are concerned. But in such cases a different principle applies, and the reason for that difference is, that the real owners of the lands are incompetent to manage them, or to consent to such remission, and the Court acts vicariously for the minor or lunatic in the same manner as it concludes that it would have been prudent for those persons themselves to have acted, and as it therefore presumes they would have acted had they not been under disability. The Court has in those cases assumed and exercised the power so to deal with the estate *quod* owner, and to consent to reduction of rents either by way of remission of arrears, or by way of prospective abatement. But where the parties to a suit, and interested in the property, are competent to give or refuse consent, I cannot say that it is according to authority, principle or practice for the Court to remit rents against the consent of such parties. With regard to authorities, they are not very numerous; but such as they are, the current of them steadily flows in one direction.

As to the Court of Exchequer, I shall first allude to the communication made to Master Murphy by Master Lyle, the late Chief Remembrancer of that Court, that it was not the practice of that Court to remit arrears of rent without the consent of the proprietor of the lands. In *Woodward v. Woodward* (a) the receiver applied for a reference to inquire whether it would be for the advantage of the estate that the arrears of rent, or any part thereof, should be forgiven. Notice of the motion was given to the inheritor, but he did not appear. Joy, C. B., said that the motion was unusual on the part of a receiver, and that he thought it almost a matter of course to refuse it. But Smith, B., took a larger view of the question, and said:—"We have taken only the management of the proceeds into our hands. I do not think that we have the power of

1851.  
*Chancery.*  
HAMILTON  
v.  
NAGLE.  
—  
*Judgment.*

(a) Hay. & Jo. 126.

1851.

Chancery.HAMILTON  
v.

NAGLE.

Judgment.

lessening those proceeds. I think I recollect a case very lately where such a motion as this was refused." Again, in the same Court I find the case of *Robinson v. Shearer* (*a*), which is important for two reasons—first, because it affirms the principle of *Woodward v. Woodward*; and secondly, because with respect to a distinction said to have been taken by Sir William M'Mahon, M. R., between the remission of past arrears and a permanent future reduction. Joy, C. B., says:—"The land is not ours. We cannot interfere with the rents. All that we can do is to order our officer to receive them. I do not understand the distinction taken by the Master of the Rolls." In *Morrow v. Sausse* (*b*), before myself in the Court of Exchequer, I find that we required the consent of the inheritor. I refer to that case because Richards, B., who was well acquainted with the practice of that Court, concurred in requiring that consent. In *Crofts v. Poe* (*c*) Pennefather, B., says:—"We never sanction abatements to tenants without the consent of the inheritor." I must therefore take it that the established practice of the Court of Exchequer was never either to remit arrears or to abate rents without the consent of the proprietor of the lands.

There is not much to be found in the books as to the practice of the Court of Chancery; but so far as the cases have been reported they seem to be much to the same effect as those in the Exchequer. In *Evans v. Taylor* (*d*) Sir Michael O'Loughlen, M. R., said:—"I think it is always for the benefit of an estate that the old arrears should be cleared off from the tenants. If the application is made by the persons who represent the estate, I will make the order; but I cannot reduce the rental without their concurrence." I quite concur in his observation; and also in the general grounds on which the order in the present case has been made by the Master of the Rolls. I cannot conceive any thing more prejudicial and ruinous to the estate than to leave upon the tenants a hopeless accumulation of arrears. I have had daily experience of this in infancy and lunacy matters during the late unfortunate circumstances in which this country has been placed. The case of *Davis*

(*a*) Hay. & Jo. 799.(*b*) 8 Ir. Eq. Rep. 519.(*c*) 3 Law Rec. N. S. 99.(*d*) S. & Sc. 681.

v. *Cotter* (*a*) is an *a fortiori* case, because, although the application was made in reference to the tenants of a minor, yet the Court required that the concurrence of the guardians should be given previously to permitting the tenants to surrender their holdings on being forgiven all arrears of rent. In *Fitzgibbon v. Flynn* (*b*) a reference was granted somewhat reluctantly; but it was the case of a tenant under the Court; the debt was due to the Court, and therefore was one over which the Court had full jurisdiction.

1851.  
 Chancery.  
 HAMILTON  
 v.  
 NAGLE.  
 Judgment.

Without taking up any more of the public time, I shall content myself with again referring to the judgment of Master Murphy, in which all the authorities have been diligently collected and ably commented on. What is sought to be done is in fact to relieve the tenants from their covenants. I apprehend that all the Court is put in motion to do is to collect the rents of the lands, and to discharge the obligations upon them; and after the determination of the suit, the Court cannot interfere with the inheritor. Could the Court so interfere by injunction to prevent the inheritor or his mortgagee from suing the tenants on obligations entered into by them before the suit had commenced? It would be quite against principle to do so where their consent had not been given to the discharge of the tenant. I was not contented with ascertaining the practice in Ireland. As to the two cases in the English reports, which were referred to after the argument, viz., *Millbank v. Stevens* (*c*), and *Lateward v. Schreiber* (*d*) it will be found that in both of those cases infants were interested, and the Court had therefore complete control over the rents. I wrote to the present Master of the Rolls in England, Sir John Romilly, and have received a communication in reply, stating that the "practice there is uniform; that in cases where the person interested in the rents of an estate on which a receiver is appointed is a person under disability, the Court or the Masters remit rents to the tenants when they consider it reasonable to do so, without taking any steps to enforce payment. But where the persons interested in the rents are persons not under any disability—in these cases neither the Court nor the Masters can remit rents

(*a*) S. & Sc. 685.

(*b*) S. & Sc. 687.

(*c*) 1 C. P. Coop. 45.

(*d*) Ibid. 46.

1851.

Chancery.HAMILTON  
v.NAGLE.Judgment.

without the consent of the persons so interested." And he adds that he does not well see how it could be otherwise done on principle, and that he had sent to all the Masters' offices and to the Registrar's, and they concur in saying that unless by consent, or where the persons interested in the rents are unable to consent, they have never known it done. Under these circumstances it appears to me that, beneficially intended as this order undoubtedly was, I am obliged to say that it is not in accordance with practice, authority or any principle upon which the Court can safely act, and that it must accordingly be reversed.

JOHN KIDD, JOHN GORDON and SARAH GORDON,  
otherwise KIDD,

v.

S. L. FRASIER and JOHN KIDD.\*

July 1, 2.

By an antenuptial settlement monies, the property of the wife, were settled in trust to pay the interest to her during her life, and in the event of her death in the lifetime of her husband, then as to the principal, in trust as she should appoint; and in the event of her dying without appointing and without issue surviving her, then "in trust for the persons legally entitled thereto as the next-of-kin of the wife," free from the control or debts of the husband. The wife died in the lifetime of the husband without leaving any issue surviving her. She was survived by a brother, a sister and a niece (the only child of a deceased brother). Held, that the niece was entitled to one-third part of the monies.

without appointing and without issue surviving her, then "in trust for the persons legally entitled thereto as the next-of-kin of the wife," free from the control or debts of the husband. The wife died in the lifetime of the husband without leaving any issue surviving her. She was survived by a brother, a sister and a niece (the only child of a deceased brother). Held, that the niece was entitled to one-third part of the monies.

\* *Ex relatione ALFRED M'FARLAND, Esq.*

credit of the cause, to be applied and distributed as the Court might direct.

It appeared that by indenture of the 4th of April 1842, made between the respondent John Kidd of the first part, Mary Kidd of the second part, and the respondent S. L. Frasier of the third, reciting (amongst other things) that Mary Kidd was possessed of and entitled unto the sum of £316. 11s., then lent out at interest, with certain chattel property or household furniture, and that a marriage was intended to be shortly had between her and the *respondent* John Kidd, and that it had been agreed said sum and furniture should be vested in Frasier upon the trusts and for the purposes thereafter particularly mentioned, it was witnessed (*inter alia*) that for the considerations therein expressed, Mary Kidd, by the direction and with the assent of the *respondent*, John Kidd, granted and transferred the same accordingly unto S. L. Frasier, his executors, &c., to hold to him and them upon trust, as to the £316. 11s., to pay the interest thereof to her for life; but if she should die in the lifetime of the *respondent* John Kidd, then to stand possessed of the principal money for such persons and in such shares as she should appoint, &c.; and in the event of her dying without having made such appointment, and without issue her surviving, in that case, "in trust for the persons legally entitled thereto as the next-of-kin of the said Mary Kidd, and same not in any event to be subject to the control, debts, &c., of the said John Kidd;" and as to the household furniture, for the sole and separate use of Mary Kidd.

The marriage was solemnised shortly after the execution of the deed of settlement; and Mary Kidd died on the 13th of June 1849, without having made any appointment, and without leaving any children then living, but survived by her husband, and by the *petitioner* John Kidd her brother, and by the petitioner Sarah Gordon, otherwise Kidd, her sister; and the petition stated that the two last named persons were her only next-of-kin, and in the events which had happened claimed that they, or the petitioner John Gordon, in virtue of his marital right, as husband of Sarah, were absolutely entitled to the £316. 11s., and the other trust premises, for their own benefit respectively.

1851.  
*Chancery.*

KIDD

v.

FRASIER.

Statement.

1851.

Chancery.KIDD  
*v.*Frasier.Statement.

By order of the Court, one Robert Wilson was appointed guardian *ad litem* for the purpose of defending the rights of Martha Kidd, a minor, who had been served with notice of the petition; and from the affidavit filed in the cause by Wilson on her behalf it appeared that on the 10th of September 1839, her father (Isaac Kidd), who was another brother of Mary Kidd, died intestate, survived by his wife Elizabeth Kidd, then pregnant, and who, two days after his death, gave birth to Martha. The affidavit also averred that, upon the death of Mary Kidd, she left the petitioners John and Sarah, *and Martha Kidd*, her sole next-of-kin by virtue of the Statute of Distributions, and submitted that Martha, as representing her deceased father, and as one of the next-of-kin of Mary, was entitled under the settlement to one third part of the £316. 11s., and the furniture, and therefore denied that the petitioners were entitled to the whole of the money, but admitted they were entitled to two third parts thereof.

Mr. *Andrews* and Mr. *F. Fitzgerald* (with whom was Mr. *M'Blain*), for the petitioners.

Argument.

The respondent John Kidd, the husband of Mary, did not, under the ultimate limitation in the deed of settlement, take any interest in the money: *Bailey v. Wright* (*a*); *Garrick v. Lord Camden* (*b*). The question lies simply between the petitioners and Martha Kidd, the intervening party, and the former are entitled to the entire of the fund; the latter, who is merely niece to Mary Kidd, cannot, according to the law of consanguinity, be one of the next-of-kin of Mary Kidd, while she has a brother and sister still living; and that law is the one to be regarded, not the Statute of Distributions: \* *Elmsley v. Young* (*c*), overruling *Phillips v. Garth* (*d*), *Hinchley v. MacLaren* (*e*), and the decision in the principal case at the Rolls (*f*);

(*a*) 18 Ves. 49; affirmed on appeal, 1 Swanst. 39.

(*b*) 14 Ves. 381-82.

(*c*) 2 My. & K. 780.

(*d*) 3 Bro. C. C. 64.

(*e*) 1 My. & K. 27.

(*f*) 2 My. & K. 82.

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\* 7 W. 3, c. 6 (*Ir.*)—Section 2 of this statute enacts, That all ordinaries, and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole

*Withy v. Mangles* (a), affirmed on appeal (b); *Brandon v. Brandon* (c); *In re Webster's Settlement* (d). In *Withy v. Mangles*, when on appeal, Lord Cottenham says:—"It was then argued that the term 'next-of-kin' had by usage acquired a meaning, in which it must be supposed to have been used in the settlement; and that such meaning was, 'those who, as next-of-kin, were entitled to to the succession of personality.' The Statute of Distributions (e) accurately preserves the distinction between 'next-of-kin' and those to whom it directs the distribution of the personality. If there be no children, it directs the distribution of the estate equally to every of the 'next-of-kindred' of the intestate who are in equal degree, and those who legally represent them; and then confines the representation within brothers' or sisters' children, not treating the rights of those who take by representation as belonging to them as next-of-kin, but as derived from others, who, if they had lived, would have been next-of-kin. If the familiar expression 'next-of-kin under the statute' be construed as having reference to this provision of the statute, it will not be found to be so inaccurate as has been supposed. The question, however, is not whether 'next-of-kin under the statute' has not been inaccurately used as describing those who are entitled under the statute, but whether the term 'next-of-kin,' without any reference to the statute, has received any such judicial

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Chancery.  
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v.  
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—  
Argument.

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| (a) 4 Beav. 358.                          | (b) 10 Cl. & Fin. 215.      |
| (c) 3 Swanst. 312.                        | (d) 19 Law Jour. N. S. 445. |
| (e) 22 & 23 Car. 2, c. 10 ( <i>Eng.</i> ) |                             |

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surplusage of such estate or estates in manner and form following—that is to say, one-third part of the said surplusage to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate, and such persons as legally represent such children, in case any of the said children be then dead. . . . And in case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the said intestate, the residue of the said estate to be distributed equally to every of the next-of-kindred of the intestate, who were in equal degrees, *and those who legally represent them*: Provided (section 3) that there be no representations admitted amongst collaterals after brothers' and sisters' children; and in case there be no wife, then all the estate to be distributed equally to and amongst the children; and in case there be no child, then to the next-of-kindred in equal degree of or unto the intestate, *and their legal representatives as aforesaid*, and in no other manner whatsoever.

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v.

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Argument.

construction. A short examination of the cases will show, that the contrary is established by a very great preponderance of authority."

It may be that where a clear intention to that effect is manifested in the instrument, the statute will regulate what parties are to take; but here the expression simply is, "the person legally entitled as the next-of-kin;" and this does not advance the case of the petitioners beyond where it would have stood had the terms been "next-of-kin," *simpliciter*. In *Kilner v. Leech* (a) there was an express reference to the statute.

Mr. *Leslie*, for Martha Kidd.

Admitting the authority of the cases cited, they do not apply to the present; the words "legally entitled" take it out of the cases in which the expression used had been "next" or "nearest of kin," without anything more; the words here are to be construed as meaning "legally entitled as next-of-kin within the Statute of Distributions:" *Garrick v. Lord Camden* (b); *Long v. Blackall* (c); *Lowndes v. Stone* (d): and Martha Kidd, as standing in the place of her father, is entitled to share equally with the petitioners.

Mr. Serjeant *Christian*, Mr. *Brewster* and Mr. *Ross Moore*, appeared for the respondent Frasier.

The LORD CHANCELLOR.

Judgment.

I should be very sorry to find that this case was concluded by the authorities which have been referred to on the part of the petitioners. They constitute a series of decisions from which I shall be glad to escape if possible. The words here are not "next-of-kin" alone; they are not words pointing to a class of persons by that name; but they are of a more extended signification: they are "the persons legally entitled as the next-of-kin." Now, under the Statute of Distributions the "next" or "nearest of kin" would not *per se* be "legally entitled" to the property of the deceased; but they and

(a) 10 Beav. 362.

(b) 14 Ves. 372.

(c) 3 Ves. Jun. 486.

(d) 4 Ibid, 648.

those who legally represent deceased's next-of-kin would, and I ought to give weight, if possible, to every word in the instrument. If then, in endeavouring to put a construction on the settlement before me, I find it giving the fund in question not to "the next-of-kin" alone, but to the persons legally entitled as next-of-kin, am I to say it is to go to the next-of-kin according to consanguinity merely, who are not as such the persons "legally entitled to it;" or am I to give it to all the persons "legally entitled" by reason of kindred? My present impression is that I ought to put this large interpretation on the expression, and declare the niece entitled to an equal share in the fund, as being one of the persons legally entitled under the statute; but I will look into the case before the House of Lords (*a*), and the one cited from the *Law Journal* (*b*), which appears to be the strongest.

1861.  
Chancery.

KIDD  
v.  
FRASIER.

Judgment.

**The LORD CHANCELLOR.**

His Lordship again mentioned the case on this day. He had examined the authorities, and was still of opinion that the fund should be distributed amongst the petitioners and Martha Kidd proportionably.

*Jury 2:*

3 Reg. Lib. Gen., vol. 194, 196.

(*a*) *Withy v. Mangles*, ubi supra.

(*b*) *In re Webster's Settlement*, ubi supra.

**NOTE.**—Vide *Tipping v. Howard* (15 Jurist, 911).

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## THE QUEEN v. JONES.\*

## SAME v. SAME.

(PETTY-BAG SIDE.)

July 7.

Where, subsequently to the statute 13 & 14 Vic. c. 51, a *scire facias*, at the Petty-bag side of the Court of Chancery, upon a recognizance entered into by a surety for a tenant of lands, which were the subject of a suit at the Equity side of the Court of Exchequer, after reciting the recognizance, proceeded thus :—

"As by the said recognizance, which was on, &c., in, &c., duly enrolled in her Majesty's said Court of Exchequer, and now remaining as of record in our said Court of Chancery by virtue of the statute in that case made and provided, might appear ;" to which *sc. fa.* the defendant pleaded that the Court of Chancery ought not to have or take further cognizance of the action, because the recognizance was on, &c., duly enrolled in the Court of Exchequer, whereby that Court then and there acquired, and still retained and possessed, full jurisdiction and authority to award execution against him for the said sum of, &c., according to the tenor and effect of the recognizance, and which plea concluded with the following averment, viz., "that there is not any such record of the said supposed recognizance now remaining in her Majesty's said Court of Chancery as in said writ of *sc. fa.* is above alleged ; and this the said defendant is ready to verify, wherefore he prays judgment whether this Court can or will take further cognizance of the action aforesaid." Upon a motion at the Petty-bag side to take this plea off the file as irregular, as not having been verified by affidavit, and as being false and frivolous, this Court refused to make any rule.

Under the concluding part of the 13th section of the statute, such recognizances may, upon agreement between the Lord Chancellor and Lord Chief Baron, be delivered over to such persons as may be appointed by the Master of the Rolls ; *sed quare*, whether recognizances, so transferred, become records of, and capable of being sued upon in, the Court of Chancery, unless perhaps by the Crown under its special privilege to select its Court.

\* *Ex relatione ALFRED M'FARLAND, Esq.*

D. Jephson, deceased, was plaintiff, and T. Flynn and others were defendants, and in which Michael Jones had been declared tenant to a portion of the lands in the pleadings mentioned, and entered into security by recognizance with the defendant and Thomas Jones (since deceased) as his sureties for the payment of the reserved rent of £130.

This recognizance was taken before the Right Honourable Mr. Justice Ball on the 4th of August 1848, as one of the Judges of Assize for the Munster Circuit, in the summer of that year, pursuant to an order of the Court of Exchequer, which it recited; and by it the three parties acknowledged themselves to be jointly and severally indebted to the Queen, her heirs, &c., in the sum of £260, to be levied off their and each of their goods, lands, &c.; and after stating (amongst other things) the several proceedings in said cause of *Jephson v. Flynn*, under which Michael Jones had become such tenant, and the security been measured, the condition of the recognizance was declared to be, that if he, his heirs, &c., should from time to time duly pay the said rent according as the same became due, then the recognizance was to be null, otherwise to remain in full force.

Another and similar recognizance was entered into at the same time, save that the amount was different, and both were enrolled in the proper office of the Court of Exchequer, where they remained until the passing of the 13 & 14 Vic. c. 51, which received the royal assent on the 29th of July 1850, and enacts (sec. 1) that on the following day all the power, authority and jurisdiction of that Court as a Court of Equity, and all the power, authority and jurisdiction which should have been conferred on or committed to the said Court of Exchequer by or under the special authority of any Act or Acts of Parliament (other than such power, authority and jurisdiction as should be then possessed by, or be incident to, it as a Court of Law, or possessed by it as a Court of Revenue, and not theretofore exercised or exerciseable by it sitting as a Court of Equity) should, by force of the now stated Act, be transferred and given to the Court of Chancery to all intents and purposes in as full and ample a manner as the same might have been exercised by the said

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Court of Exchequer if that Act had not passed ; and the same power, authority and jurisdiction should, so far as respects the exercise thereof by the latter Court, cease and determine, provided always that such Act should not abridge, lessen or in anywise affect the power, authority or jurisdiction of or incident to the said Court of Exchequer as a Court of Law, or the power, authority or jurisdiction of the same Court as a Court of Revenue not theretofore exercised or exerciseable by it sitting as a Court of Equity ; and also enacts (sec. 2) that all suits and matters which, on the said 1<sup>st</sup> of August 1850, should be depending in the said Court of Exchequer as a Court of Equity, or under such Act or Acts of Parliament as aforesaid (except as aforesaid), should by force of that Act be transferred, with all the proceedings therein, to the said Court of Chancery, there to be carried on, prosecuted, dealt with, and decided according to the practice of that Court, in the same manner in every respect as if such suits and matters had been originally commenced there ; and all decrees and orders which should have been made by the said Court of Exchequer in such suits and matters should, to all intents and purposes, be deemed and taken to be decrees or orders respectively of the said Court of Chancery. And further enacts (sec. 13) that all bills, &c., and proceedings of the said Court of Exchequer as a Court of Equity (except as aforesaid), and all decrees and minute-books, and all other books and documents whatsoever relating exclusively to proceedings in that Court as a Court of Equity (except as aforesaid) should, on the same day, or as soon after as conveniently might be, be delivered by the several officers of the said Court of Exchequer then having the custody of the same, to such person or persons as should be appointed by the Master of the Rolls to take charge of them, by warrant under his hand, approved of and countersigned by the LORD CHANCELLOR, and from and after such delivery the said bills, &c., and other proceedings should be deemed records of the Court of Chancery, in the custody of the Master of the Rolls [as fully as if they had originally been like records of the said Court of Chancery ; and all such of the *other* records, books and papers then in the care of any of the officers of the Equity side of the said Court of

Exchequer as should be agreed upon between the LORD CHANCELLOR and the Lord Chief Baron should be delivered over into the hands of such person or persons as should be appointed in like manner to receive them, subject nevertheless to such regulations as his Honour, with the approbation of the LORD CHANCELLOR and the Commissioners of the Treasury should make from time to time touching the same.]\*

The tenant's rent fell into arrear, and an attachment having been issued against him unsuccessfully, by an order of the Master of the Rolls, dated the 17th of April 1851, leave was given to the receiver in said equity cause, as so transferred from the Court of Exchequer into the Court of Chancery, to put said two recognizances in suit against said sureties; and the receiver in the cause finding, as his affidavit alleged, that those recognizances had been handed over from the Court of Exchequer to, and lodged with the Clerk of Recognizances of, the Court of Chancery, caused writs of *scire facias* to be issued on them in due course, forth of the Court of Chancery, against the defendant, his co-surety having then lately died.

These writs of *scire facias*, after reciting the recognizances on which they were issued respectively, referred to them, at the close of the recital, thus:—"as by the said recognizance, which was, on the 18th day of August in the year of our Lord 1848, duly enrolled in her said Majesty's Court of Exchequer, and now remaining as of record in our said Court of Chancery by virtue of the statute in that case made and provided, might appear;" and also stated respectively the circumstances under and the mode in which the recognizance

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\* The clause between brackets is not to be found in the corresponding section (17) of 5 Vic. c. 5—the statute applicable to England. There also follows this clause, "And all such further records, books and papers as *last aforesaid*, as may be so agreed upon as *aforesaid* by the Lord Chancellor and the Lord Chief Baron, shall be delivered over into the hands and care of the Master of the Pleas side of the said Court of Exchequer, subject nevertheless to such regulations as the said Master shall, with the approbation of the said Lord Chief Baron and the Commissioners of her Majesty's Treasury from time to time make touching the same."

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had been acknowledged, and the death of Thomas Jones without having, or any person on his behalf since his decease, paid to the Queen the said sum of £260, or any part thereof, according to the form and effect of the recognizance aforesaid, and that the said Michael Jones and James Jones had not, nor had either of them as yet paid that sum, or any part thereof to her Majesty, but the same remained still wholly unpaid; and required the defendant to show cause in the Court of Chancery by a given day, why execution should not go against him for such sum, according to the tenor and effect of the recognizance.

To each of these writs of *scire facias* the defendant pleaded, that the Court of Chancery "ought not to have or take further cognizance of the action aforesaid, because he says, that the said recognizance in said writ of *scire facias* mentioned was, on the said 18th day of August 1848, duly enrolled in her Majesty's said Court of Exchequer, whereby the said Court then and there acquired, and still retains and possesses full jurisdiction and authority to award execution against him the said James Jones for the said sum of £260, according to the tenor and effect of the said recognizance; and the said James in fact saith, that there is not any such record of the said supposed recognizance now remaining in her Majesty's said Court of Chancery, as in said writ of *scire facias* is above alleged; and this the said James is ready to verify: wherefore he prays judgment whether this Court [of Chancery] can or will take further cognizance of the action aforesaid."

These pleas were filed without being verified by any affidavit, and therefore, and as it was conceived on the plaintiff's part that they were dilatory, application was made to the officer to take them off the file, and permit judgments to be marked on the writs of *scire facias*; but he declined to do so without the order of the Court, and hence the present motion.

**Mr. Deasy** and **Mr. Bastable**, for the plaintiff.

**Argument.** These pleas are dilatory: *Com. Dig. tit. Abatem.*, B 2; *Steph. on Pl.* p. 67; *Medina v. Stoughton* (a); *Godson v. Good* (b); 2 *Saund.*

(a) *Ld. Ray. Rep.* 593.

(b) 2 *Marsh.* 299; *S. C.* 6 *Taunt.* 587.

*Rep.* 209 c., n.(k); *Davidson v. Chilman* (a). The statute 6 Anne (Ir.) c. 10, s. 11, declares that no dilatory plea shall be received in any Court of record, unless the party offering it do, by affidavit, prove the truth thereof, or show some probable matter to the Court to induce it to believe that such dilatory plea is true—there was no such affidavit here. See *Hughes v. Alvarez* (b); *Pearce v. Davy* (c). That statute applies equally to Crown cases as to those between subject and subject: *The Queen v. Duffy* (d). The pleas traverse no fact and tender no available issue. Had they been in bar, as they could equally have been (1 *Chit. on Pl.*, p. 476), the plaintiff might have demurred, and if successful there would have been final judgment, whereas upon the present pleas the judgment can merely be *respondeat ouster*.

Neither can any thing be shown to the Court to induce it to believe that the circumstances alleged in these pleas are in accordance with the truth. On the contrary it has been found on inquiry that recognizances such as those in question were always enrolled in the books of the Secondary's office at the Equity side of the Court of Exchequer, and by virtue of one or other of the provisions in 13 & 14 Vic. c. 5, s. 13, they were duly delivered out of that Court to the Clerk of Recognizances in Chancery; this Court has judicial knowledge of that fact: and since then they are to be deemed records, and within the custody of this Court, as fully as if they had originally been like records of it; the mere circumstance of their transfer should determine this, and it is stated in the writs of *scire facias*, that the recognizances now remain as of record in this Court. The pleas are therefore as false in fact as they are frivolous in law, and ought to be taken off the file: *The Queen v. Beatty* (e); *The Queen v. Foot* (f). Nor does the Court of Exchequer any longer retain jurisdiction in respect of these recognizances; it is *functus officio* as regards them (ss. 1 & 2 of same Act). Had the plaintiff attempted to issue writs of *scire facias*, on these recog-

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(a) 1 Bing. N. C. 297.

(b) 2 Ld. Ray. R. 1400.

(c) Say. Rep. 293.

(d) 9 Ir. Law Rep. 163.

(e) 8 Ir. Eq. Rep. 132.

(f) *Supra*, p. 9.

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nizances, forth of that Court, *nul tiel record* could have been well pleaded there.

Mr. Greene and Mr. Stephens, for the defendant.

These are not pleas within the Act of 6 Anne, which require verification by affidavit; they are pleas in bar. The issue joined is the only one that could have been taken, and is to be decided by the Court itself. In *The Bishop of Sodor and Man v. The Earl of Derby*<sup>(a)</sup> Lord Hardwicke lays it down:—"The rule of law is, that in a plea to jurisdiction, like a plea in abatement, when it is to a Court of general jurisdiction, you must also show where the jurisdiction rests, as well as negative that it is not there" (in the other Court); and that is exactly what has been done here. But were the pleas less extensive than they are, even in dilatory pleas, although a matter of fact, properly so called, must be verified or made probable to the Court, yet where a fact is obvious on the plaintiff's own showing, or within reach of the Court itself, or the matter is one of law, there can be no necessity for an affidavit in support of it on the part of the defendant; and here it appears on the face of the writs of *scire facias*, that the recognizances were acknowledged under the authority of, and duly enrolled in, the Court of Exchequer; and there is no proper averment which the defendant could traverse of their having been ever afterwards transferred to the Court of Chancery, though there is a species of unavailing recital to that effect.

Again, the 1st and 2nd sections of the 13 & 14 Vic. c. 51, merely transfer to the Court of Chancery the jurisdiction of, and suits and matters in, the Court of Exchequer as a Court of Equity; its jurisdiction as a Court of Law, and as a Court of Revenue not previously exercised or exerciseable by its sitting as a Court of Equity, is expressly excepted from the operation of the Act. Now, the jurisdiction exercised or exerciseable in the Chancery itself, in matters of recognizance, is in its ordinary side or Court, wherein the Lord Chancellor or Lord Keeper "proceeds according to the right line

(a) 2 Ves. sen. 356.

of the laws and statutes of the realm," as distinguished from its extraordinary or equitable department, in which he acts on the rule of equity: *4 Inst.*, p. 79. The same is the case with the Court of Exchequer; its jurisdiction in such matters exists only on the Law side of it as a Court of Revenue, wherever the documents may have been kept, either by accident or for the sake of imaginary convenience: see *Hov. Rev. Exch.* pp. 106, 114, 115: and the pleas aver that these particular recognizances were duly enrolled in the Court of Exchequer, whereby it acquired, and still retains, full jurisdiction and authority to award execution against the defendant, according to the tenor and effect thereof; and also aver, expressly, that there are not in the Court of Chancery any such records of the recognizances as in the writs of *scire facias* alleged. It is not so much as stated in those writs, that the recognizances were acknowledged in a cause then depending in the Equity side of the Court of Exchequer. And it has been held in *The Attorney-General v. Halling* (*a*) that even the equitable jurisdiction of that Court in England, as a Court of Revenue, has not been taken away by the corresponding enactment for that country, *5 Vic. c. 5*. Therefore these pleas are neither frivolous or false; and were they ever so bad in law, that would be no sufficient reason for removing them from off the file: *The King v. Cooke* (*b*); *Thomas v. Smithiers* (*c*).

Nor can recognizances be considered as records at all. The 13th section of the *13 & 14 Vic. c. 51*, does not enlarge either the 1st or 2nd sections, the earlier part of it is conversant only with bills, and the like, decrees, books, &c., which relate exclusively to proceedings in the Court of Exchequer as a Court of Equity; and what follows does not provide, like the other, that the documents which might be transferred under it are to become records of the Court of Chancery, nor can the warrant of the Master of the Rolls operate to make them such; and it never could have been intended that his Honour should make "regulations" touching instruments belonging

(*a*) *15 M. & W. 687.*

(*b*) *2 B. & C. 618.*

(*c*) *4 Taunt. 668.*

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to the Law side of the Court of Exchequer, no matter into whose hands they may have previously fallen.

But be the correct construction of the Act what it may, that question is not to be decided on a summary application like the present, it should be raised by plea or demurrer.

**The LORD CHANCELLOR.**

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I do not now mean to dispose of the more important questions that have been discussed in the progress of this motion; that raised on the construction of the 13 & 14 Vic. c. 51, may be a serious one hereafter: at present, I think I should leave the parties to try it in a more regular way.

I may say, however, that undoubtedly recognizances taken in suits pending in the Equity side of the Court of Exchequer come within the 13th section of the Act. There may be some difficulty in bringing them under the first branch of it; yet in substance, they belonged more to the equitable than to the legal jurisdiction of the Court of Exchequer, though sued on at the Law side of the Court; But there is no difficulty in bringing them within the second branch of the section.

The warrant, however, which has been issued under this section by his Honour the Master of the Rolls, and countersigned by me, was in itself confined to the transfer of the equity proceedings of the Court of Exchequer, in the ordinary sense of the phrase, and applied only to the first part of the section. It will no doubt be competent to the Chief Baron and to the Chancellor, under the second branch of the section, to agree that recognizances such as these shall also be placed under the charge of the Master of the Rolls, if they are not included in the proceedings transferred under that warrant, although it may not at all follow that they would therefore become records of this Court, to be sued on here, unless perhaps indeed by the Crown, through means of its special privilege; for, beside all that has been said, there remains the consideration whether, in a case like this, the Crown cannot select the Court in which to sue; and it may be, when the books are looked into, the defendant will find himself embarrassed in that respect. However, I do not intend on this

occasion to go into that question, or to enter into any opinion upon it. But as the case is now before me, I cannot take the pleas off the file on motion for want of an affidavit. I consider the application is not sustainable on that ground. Should the proceedings go further, it may be well for those acting on behalf of the plaintiff to consider whether these writs can be maintained as they now stand, or should not be amended by inserting the express averments to which the defendant's Counsel have referred as now wanting. This is another of the questions involved—Counsel will perhaps also consider whether, under all the circumstances, it might not be better to abandon the present writs, and still sue on the recognizances in the Exchequer, or sue out amended writs.

On the whole, I must say no rule upon this motion; but it is not a case for costs.

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## STEWART

v.

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Dec. 20.

1850.

Jan. 29, 31.

1851.

Jan. 23.

April 16.

## THE MARQUIS OF CONYNGHAM.

(In the Rolls.)

Letters patent, under which lands sold by private contract were held, contained covenants by the grantee—first, that he would place three free tenants of English or British race, blood or name on the premises, each of whom should have fifty acres, or one free tenant, who

The bill in this cause was filed for the specific performance of an agreement for the sale of an estate called the Tyrcallen Estate. The common interlocutory order of reference was made to the Master to inquire whether the plaintiff, the vendor, could make a good title to the estate, and if so, at what time he showed a good title. The Master, by his report of the 3rd of May 1849, found the title good, and the purchaser took ten exceptions to the report.

The facts of the case, the substance of the several exceptions, and the principal arguments of the Counsel, are fully stated and commented on in his Honour's judgment.

should have one hundred acres for one life; secondly, that he should have on the premises eight culivers, or muskets, and a proper number of arms to arm eight pikemen for his defence against rebels, &c.; thirdly, a proviso, that if he should demise any part of the premises to the mere Irish for any term exceeding forty-one years or three lives, or if he should demise the premises limited to be disposed of to any British or English person, to any person being mere Irish, the Crown might re-enter. The particular of sale described the lands as a valuable fee-simple property, and one of the conditions of sale alluded to the letters patent. It appeared from a statute (10 Car. 1, sess. 3, c. 3,), and certain public documents therein referred to, that the covenants were those inserted in patents at the plantation of Ulster, where the lands were situate.

*Held*, that the purchaser, having express notice of the letters patent, was bound by constructive notice of the covenants contained in them.

*Held also*, that the first and third covenants were no longer in force, every subject of the Crown since the Union being a person of British race, name and blood, and there being no person now answering the description of mere Irish.

*Sembly*—The second covenant could not be now enforced by the Crown.

By marriage articles the husband agreed to settle out of the lands of K., in failure of A his daughter by a former marriage, a jointure on his intended wife, the remainder of the lands on the issue male begotten on the wife; and in failure of issue male, on the issue female; and in case A should survive, and the lands of K. should not be made good, that then the lands of K., which were not settled on the former marriage, should be subject to the jointure, and be settled on the eldest son of the marriage, and in failure of the said son, on the daughters of the said marriage. There was no male issue of the marriage, but female issue, B, C and D.—*Held*, that the lands of K. should be settled on them as tenants in common in tail.

No settlement was executed, and the lands descended to A, B, C and D, subject

**Mr. Hamilton Smythe** and **Mr. F. A. Fitzgerald**, in support of the exceptions.

**Mr. R. R. Warren** and **Mr. Christian**, for the report.

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The following authorities were cited upon the second, third and fourth exceptions:—*Martin v. Cotter* (a); *Burnell v. Brown* (b); *Seaman v. Vawdrey* (c); *Barton v. Lord Downes* (d); *Larkin v. Lord Rosse* (e); *Lyddal v. Weston* (f); *Pope v. Garland* (g); *Spinner v. Walsh* (h); *Mayor of Congleton v. Pattison* (i); *Bristow v. Wood* (k); *Vaughan v. Magill* (l); *Walter v. Maunde* (m);

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| (a) 9 Ir. Eq. Rep. 351.       | (b) 1 Jac. & W. 168.     |
| (c) 16 Ves. 390.              | (d) Fl. & K. 505.        |
| (e) 10 Ir. Eq. Rep. 70.       | (f) 2 Atk. 19.           |
| (g) 4 Y. & Col. Exch. 394.    | (h) 10 Ir. Eq. Rep. 386. |
| (i) 10 East, 130.             | (k) 1 Col. 480.          |
| (l) 12 Ir. Eq. Rep. 200, 207. | (m) 1 Jac. & W. 181.     |

to the trusts of the articles in 1763, when B, C and D went into possession. In 1783 they levied a fine, and conveyed to a purchaser for value, and covenanted that they were seized in fee. There were several subsequent conveyances for value. In 1847 the lands were contracted to be sold.—*Held*, in a suit for specific performance against the purchaser, that the legal title of A and her heirs to one-fourth of the lands was barred by the Statute of Limitations, as a Court of Law would not notice the executory trusts of the articles, and the several conveyances operated as dispossessins.

*Sembly*—The equitable title of the heir of A, on failure of issue of B, C and D, was also barred; but—

*Held*, that as a fine created no discontinuance in equity, the title was too doubtful to be forced on the purchaser.

A conveyance of all her estate, &c., was obtained from the devisee of the heir-at-law of A, and was held to put an end to the objection; for although the reversion belonged to the heir of the settlor, he must trace title through the daughters, and all their right was extinguished by this conveyance and the fine.

A recovery was suffered by a tenant for life, and remainderman in tail in 1781. The record stated that the tenant to the praecipe called to warranty the tenant for life, who appeared by his attorney, and warranted the tenant in tail, who appeared in person.—*Held*, that the recovery was valid, though the record did not state a summons to warranty, nor a warrant of attorney to authorise the appearance for the tenant for life.

After exceptions allowed to the Master's report of good title in a suit for specific performance, the practice is not to discharge the purchaser, but at the request of the plaintiff to refer it back to the Master to review his report, and to inquire whether a good title can be made to the lands.

A purchaser relied on the memorial of a deed as creating an objection to the title, and succeeded on an exception founded on it:—*Held*, that he could not afterwards object that the deed itself was not produced, although there was no condition of sale to dispense with its production.

The particulars of sale stated that the timber on the estate would be included in the purchase. Title was not made out to the timber on a very small portion of the lands. There being no misrepresentation, the Court referred it to the Master to inquire whether the timber on that portion was material to the possession and enjoyment of the estate.

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*Paterson v. Long (a); The Duke of Bedford v. The British Museum (b).*

Upon the fifth exception—*Chilliner v. Chilliner (c); Fearne Cont. Rem. p. 105; Campbell v. Sandys (d); Thompson v. Simpson (e); Cordwell v. Mackrill (f); Doe v. Phillips (g); Doe v. Lloyd (h); Hilary v. Walker (i); 1 Sugd. Ven. p. 633; 2 Inst. p. 335; Bale v. Coleman (k); Blackburne v. Staples (l); Jervis v. The Duke of Northumberland (m); Hart v. Middlehurst (n); Dod v. Dod (o); Taggart v. Taggart (p); Fausset v. Carpenter (q); Earl of Pomfret v. Lord Windsor (r); Keene v. Deardon (s).*

As to the remaining exceptions—*Anonymous (t); Pig. on Recoveries, p. 196; Swann v. Broome (u); Framlingham v. Brand (v); Rex v. St. Luke's Hospital (w); Cruise on Recoveries, p. 53; Wynne v. Lloyd (x); Lord Cromwell's case (y); 1 Preston on Conv. p. 16; 2 Inst. p. 335; Pledall v. Pledall (z); Doe v. Lloyd (aa); Doe v. Phillips (bb); In re Lamont (cc); Rogers v. James (dd); Forster v. Forster (ee); Hume v. Burton (ff).*

Dec. 20.Judgment.

#### The MASTER OF THE ROLLS.

In this case the bill was filed against the defendant to compel the specific performance of an agreement, dated the 24th of April 1845,

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| (a) 6 Beav. 590.                                   | (b) 2 M. & K. 552.        |
| (c) 2 Ves. 528.                                    | (d) 1 Sch. & Lef. 281.    |
| (e) 1 Dr. & War. 459.                              | (f) 2 Eden, 344.          |
| (g) 10 Q. B. R. 130.                               | (h) Peake on Ev., Ap. 41. |
| (i) 12 Ves. 266.                                   | (k) 1 P. Wms. 142.        |
| (l) 2 Ves. & B. 367.                               | (m) 1 J. & W. 559.        |
| (n) 3 Atk. 376.                                    | (o) Ambl. 274.            |
| (p) 1 Sch. & Lef. 84.                              | (q) 2 Dow. & Cl. 232.     |
| (r) 2 Ves. 483.                                    | (s) 8 East, 248.          |
| (t) 1 Leon. 86.                                    | (u) 3 Burr. 1595.         |
| (v) 3 Atk. 389.                                    | (w) 2 Burr. 1065.         |
| (x) Sir T. Raym. 16; S. C. 1 Lev. 130; 1 Sid. 213. |                           |
| (y) 2 Rep. 74, a.                                  | (z) Sir T. Moo. 96.       |
| (aa) Peake on Ev., Ap. 41.                         | (bb) 10 Q. B. 130.        |
| (cc) 3 Scott, 666.                                 | (dd) 7 Taunt. 434.        |
| (ee) 6 Taunt. 373.                                 | (ff) 1 Ridg. P. C. 16.    |

for the purchase of the Tyrcallen estate, situate in the county of Donegal.

The usual order of reference was made on the 24th of May 1847, whereby it was referred to the Master to inquire and report whether or not the plaintiffs could make a good title to the estate, the subject matter of the contract of the 24th of April 1845, and if so, at what time the plaintiff showed a good title.

The Master made his report on the 3rd of May 1849, whereby he reported that the plaintiffs could make a good title to the said estate, and that they showed a good title to the said estate on the 9th of January 1849.

Ten exceptions have been taken to the Master's report by the defendant.

The first exception has been given up by the defendant's Counsel, and is therefore, upon their consent, to be overruled.

The second, third and fourth exceptions may be disposed of together.

The second exception is, that it is stated in the charge of the plaintiffs that the hereditaments and premises are holden of the Crown under certain letters patent, dated the 19th of March, 15 Car. 1, to one Peter Benson, and his heirs, by which letters patent the said hereditaments and premises appear to be subject to two covenants on the part of the said Peter Benson, and his heirs and assigns, to which I shall hereafter particularly advert.

The third exception is, that the letters patent contain another covenant, to which I shall also advert.

The fourth exception is, that the letters patent contain certain provisoies and conditions of re-entry in the event of the breach of the covenants in the second exception mentioned.

In the printed rental and particulars of sale, under which the estate was sold, it is represented to be a fee-simple property. The lands in question were granted by King Charles the First to Peter Benson, and his heirs and assigns, by letters patent, duly enrolled, bearing date the 19th of March, in the fifteenth year of his reign.

By those letters patent King Charles the First, for the consider-

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ations therein mentioned, granted to the said Peter Benson, his heirs and assigns, certain lands therein particularly described (which it is admitted include the lands in question), *Habendum* to the said Peter Benson, his heirs and assigns for ever, paying annually the sum of £21. 17s. 6d.

The letters patent, after some provisions upon which no question has been raised, contain a covenant by Peter Benson for himself, his heirs, executors, administrators and assigns, with King Charles, his heirs and successors, that he the said Peter Benson, his heirs and assigns, within the space of two years next following after the date of the said letters patent, should constitute, place and have three free tenants of English or British race, blood or name, in and upon the premises before granted, each of whom should have to himself a demise or grant of at least fifty acres of land, meadow and pasture, English standard measure, parcel of the premises aforesaid; or in place of two of the said three tenants, should constitute and place one free tenant of English or British race, blood or name, who should have one hundred acres of land, &c., parcel of said premises; and that the said tenants, respectively, should have an estate at least for the term of one life; and the letters patent then contain a provision, which appears, from the copy sent to me, to be partly defaced, but which appears to amount to this, that upon the determination of the interest of any such tenant or tenants, another tenant or tenants of English or British blood, race or name, should, from time to time for ever, be constituted and placed in like manner by the said Peter Benson, his heirs and assigns.

The said Peter Benson, for himself, his heirs and assigns, further covenanted that he, his heirs and assigns respectively, from time to time should prepare and have in readiness, in and upon the premises before mentioned, or any parcel thereof, "eight culivers, or muskets, and a proper number of arms to arm or accoutre eight pikemen for the defence or safety of the said Peter Benson, his heirs and assigns, and their tenants, against rebels and other enemies of us, our heirs and successors, in our said Kingdom of Ireland."

The letters patent then, after giving authority to Peter Benson, his heirs and assigns, to let certain parts of the lands to the "mere

Irish" for forty-one years or three lives, contains the following proviso:—"Provided always that if the aforesaid Peter Benson, his heirs and assigns, or any of them, shall in any other manner grant or demise the premises above by these presents limited to be granted, to the mere Irish, or any of them, or any hamlet, part or parcel of the same, or any or either of them, for any estate or term exceeding the term of forty-one years, or the term of three lives as aforesaid, then it shall and may be lawful for us, our heirs and successors, into all and singular such part or parcel of the premises granted or demised beyond the aforesaid term, to re-enter and re-possess and retain the same during the entire estate or term of said demise or demises, &c., provided always that if he the aforesaid Peter Benson, his heirs or assigns, or any of them, in any manner shall alienate, grant, demise or sell the premises last mentioned in the hands of the said Peter Benson, his heirs or assigns (limited to be disposed of to any British or English person in fee-simple, fee-farm, fee-tail), or any agistment of pasture, or common of pasture upon the premises, or any estate thereof, for term of years or otherwise, to any person or persons whatsoever being 'mere Irish,' or who were not of English or British race, origin or surname, unless it be a small parcel thereof to some artist or artists, who shall be allocated by our aforesaid Deputy, or other Chief Governor or Governors of this our Kingdom of Ireland, with the advice of four or more of the Privy Council of us, our heirs or successors, in our said Kingdom of Ireland for the time being, and for such parcel only as shall be by them limited and appointed, that then it shall and may be lawful for us, our heirs and successors, to enter into all and every such part or parcel of the same premises so alienated, granted, sold or demised, otherwise than as aforesaid, and to have, collect and take the profits thereof to the use of us, our heirs and successors, during the entire term of such alienation."

The printed rental or particulars of sale, upon which the contract to purchase is indorsed, describes the lands as a valuable fee-simple property.

The property was sold subject to certain conditions of sale, indorsed upon the rental.

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By the twelfth condition of sale it is provided, that "if any variance shall appear in the nomenclature of the lands as in the rental, abstract and deeds, and the lands as named in the *letters patent* under which they are held, no objection shall be made by the purchaser on account of the same; but the lands in the rental and abstract shall be deemed as some or one of the denominations in said *letters patent*."

The defendant had thus express notice that the property was derived under letters patent.

The plaintiff's Counsel contended—first, that the defendant having express notice, by the conditions of sale, that the lands were held under letters patent, had constructive notice of the covenants and conditions referred to in the second, third and fourth exceptions, and could not therefore object to the title, on the ground of those covenants and conditions; secondly, that those covenants and conditions are not an objection to the title.

With respect to the question of notice, it was decided by Sir W. Grant, in the case of *Hall v. Smith* (*a*), that where an estate was sold, and it was stated in the particulars of sale that the lands were in lease, and there was no misrepresentation, the purchaser will not be entitled to any compensation, although there are covenants in the lease contrary to the custom of the country, because whoever buys with notice of a lease buys with notice of all its contents.

In the case of *Pope v. Garland* (*b*), a leasehold interest was sold under a decree of the Court of Exchequer in England. It was held by Baron Alderson that the omission to state unusual covenants in the particulars of sale did not affect the title. In giving judgment he said:—"I agree with the principle, which seems to me to be well laid down in *Hall v. Smith*, that where a purchaser has notice of a lease, it is his business to look to the clauses of it, to see whether it materially influences his judgment in the purchase. I see no distinction between this case and those where the landlord sells, and says that the property is under lease. If he do not state it to be so, he does not state the case so as to enable the purchaser to know what he is to purchase, and that is a misrepresentation. But it is clear, and that is not denied in argument, that where there are

(*a*) 14 Ves. 426.

(*b*) 4 Y. & Col. Ex. 394.

outstanding leases, it is the duty of the purchaser who has notice of them, to ask and ascertain what the terms are upon which the property is out on lease, so that he may know precisely the nature of the property which he purchases—that is, whether he has certain rights upon it, or whether his rights are in any manner restricted. What is the difference in principle in purchasing a lease? The conditions under which the lease is framed are what makes the land more or less valuable; just as in the other case the nature of the leases makes the land more or less valuable to the purchaser. In *Hall v. Smith* the Master of the Rolls, referring to the objection which had been made to the covenants in the lease, said:—‘The objection comes to this, that if there be any covenant at all burthen-some to the landlord, the purchaser may object to the title.’ So here, this is said to be a covenant burthen-some to the vendor. Admitting that it is so (I do not know that it is so, but it is said to be so), what is the vendor to do? To make a good title to a lease which is charged with certain burthens and certain covenants. If so, there is an end to the objection. But if there is misrepresenta-tion, so that the acuteness and industry of the purchaser is set to sleep, and he is induced to believe the contrary of what is the real state of the case, the vendor is bound by that misrepresentation.”

These cases were followed by me in *Spunner v. Walsh* (a).

The defendant’s Counsel have contended that those authorities do not govern the present case.

In the case of *Hall v. Smith* the fee-simple was sold subject to a lease, referred to in the particulars of sale. In *Pope v. Garland*, and *Spunner v. Walsh*, the interest sold was a leasehold interest. It is contended that in the former case title was made out to what was sold, namely, a fee-simple property, subject to a lease, with covenants and conditions; and that in the latter cases title was made out to what was sold, namely, certain leasehold interests, with cove-nants and conditions; and that the purchaser, having notice of the leases, which it was to be assumed were subject to some covenants and conditions, could not object to the title on the ground that they may have been more or less burthen-some.

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In the present case what was sold was an estate in fee-simple, which, from its nature, is not in general subject to burthens or covenants; and it is contended that a mere reference to the deed, under which the estate in fee may be held, ought not to be considered as constructive notice that such an estate was subject to burthens or covenants. It does not appear necessary that I should decide that abstract question in this case. In the present case the defendant had express notice that the property was held under letters patent of the 15 *Car. 1*, and that the lands were in the county of Donegal. The circumstances connected with the plantation of Ulster are not only matter of history, but are recited in a statute passed five years before the date of the letters patent. By that Act (10 *Car. 1*, sess. 3, c. 3), entitled "An Act for the securing the estates of the undertakers, servitors, natives and others, holding lands, tenements or hereditaments in all and every the plantations made by Queen Elizabeth, or King James the First, or his then Majesty," after reciting that, for the better government and security of the Kingdom of Ireland, sundry plantations had at several times been made in all the counties in the Act mentioned; and, amongst others, in the county of Donegal, grounded as well upon ancient as recent title of the Crown, declared, as well by inquisitions as by other records and evidences—upon all which divers patents had been passed, and thereby very many undertakers and others of British birth, and very many of the natives of the best quality and condition had been there planted and settled, some parcels of the said lands being only distributed and not passed, by reason of restraints for some years past; and after reciting the advantages derived from such plantations, and reciting that the Crown was pleased to grant unto his said subjects that their estates intended to them in their said plantations should be secured, and to the end that all question or doubt as to the title of the Crown should be taken away, enacted that the Crown should be rightly, and by good, lawful and indefeasible title and estate in fee-simple, deemed and adjudged to be in the actual and real possession and seisin, in right of the Imperial Crown of England and Ireland, of all the castles, manors, lands, tenements and hereditaments, situate in the county of Donegal, and the

other counties and places therein mentioned ; and the statute then provides for the granting of new letters patent, within five years from the end of the then session, to the former patentees or proprietors, or such as by former distribution, assignation, or appointment, have taken the profits thereof ; and that, from the new passing or sealing of any such new letters patent, the grantee should hold and enjoy the manors, lands, tenements, &c., in the said several counties, &c., which shall be granted or confirmed as aforesaid, for such estate as shall be limited or declared by such letters patent, as well against the Crown as against all other persons whatsoever. The letters patent to Peter Benson bear date March 1639, within the five years mentioned in said Act. On referring to *Pynner's Survey of Ulster*, made in 1619, under a Commission under the Great Seal of Ireland, dated in 1618, it appears that Peter Benson, one of the English undertakers, was then in possession of the manor mentioned in the letters patent of 1639 : *Harris's Hibernica*, p. 181. I have had search made in the Rolls-office, and it appears that he obtained possession of the lands by assignment from the original patentee, 13 *Jac.* 1, and that letters patent were granted to him, dated 5 *Car.* 1 ; and the letters patent of the 15 *Car.* 1 were letters patent of confirmation under the statute I have referred to.

The plantation of Ulster, which is a matter of history, and which is thus referred to in the statute I have mentioned, was carried out under a commission, which I have ascertained was enrolled in the Rolls-office, in the 16 *Jac.* 1. A copy of that document will be found in *Harris's Hibernica*, p. 131, oct. ed., 1770. The articles of instruction to the Commissioners for the plantation of Ulster, set out in the said commission, and enrolled in the Rolls-office, and stated p. 134 of Mr. *Harris's* work, directs that "a general care be taken that such orders, conditions, and articles, as have been lately published in print, or are to be printed or transmitted, touching the plantation, be observed and put in execution, as well by the Commissioners as by the undertakers." The document "then lately published in print" was published in 1608, and a copy of it will be found in *Harris's Hibernica*, p. 123. It is headed, "Orders and Conditions to be observed by the undertakers upon the distribution

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and plantation of the escheated lands in Ulster;" and after reciting "that it was thought convenient to declare and publish, to all his Majesty's subjects, the several quantities of the proportions which should be distributed, the several sorts of undertakers, the manner of allotment, the estates, the rents, the tenures, with other articles to be observed, as well on his Majesty's behalf as on behalf of the undertakers," proceeds to state the several matters so to be observed.

Amongst other matters, express directions are given in respect of the three several provisions contained in the letters patent to Peter Benson, which are made the ground of the second, third and fourth exceptions.

This document, called the Printed Book, is referred to in the case of *The Skinners' Company v. The Irish Society* (a), and the three covenants and conditions are referred to. That case contains a short and clear statement of the most important matters connected with the plantation of Ulster. The document is given at length in *Harris's Hibernica*.

The fifth condition provides that "the said undertakers, their heirs and assigns, shall have ready in their houses, at all times, a convenient store of arms, wherewith they may furnish a competent number of able men for their defence, which may be viewed and mustered every year, according to the manner of the English."

The seventh condition provides "that the said undertakers shall not alien or demise their portions, or any part thereof, to the mere Irish, or to such persons as will not take the oath which the said undertakers are bound to take by the former article, and to that end a proviso shall be inserted in the letters patent."

The eighth condition is, that "every undertaker shall, within two years after the date of his letters patent, plant or place a competent number of English or inland Scottish tenants upon his portion, in such manner as by the Commissioners to be appointed for the establishing of this plantation shall be prescribed."

In pursuance of these instructions, which by the commission enrolled in the Rolls-office, to which I have referred, the Commissioners were directed to follow, the letters patent to Peter Benson

(a) 12 Cl. & Fin. 427.

contain the three provisions, the subject of the second, third and fourth exceptions; and I have no doubt that if the letters patent or grants to the several other undertakers who became occupying tenants were examined, they would be found to contain similar covenants and conditions.

The question then is, whether the purchaser of lands in the county of Donegal, vested in the Crown by the public statute I have mentioned, situate in the province of Ulster, and in one of the counties the plantation of which is referred to in that statute, who had express notice that the lands were held under letters patent (letters patent usually if not always being subject to covenants and conditions), may not reasonably be considered as affected by constructive notice of those covenants and conditions, upon the principle decided in *Hall v. Smith* and *Pope v. Garland*. These covenants, it is to be observed, in no way deteriorate the value of the property, and the objection is of a most technical nature, made of course only with the view of getting rid of the contract. The observations on the question of notice by Sir Edward Sugden, in *Martin v. Cotter* (a), are important. He says in that case:—"Sir W. Grant carried the doctrine, that notice of a lease to a purchaser is notice of its contents, a long way in *Hall v. Smith*; but in that case there was no mistake or misapprehension as to the subject-matter of the contract; there was nothing but a particular covenant which was not stated. It might be dangerous to say that the rule laid down in that case was universal in its application; for I can imagine a covenant in a lease which would so deteriorate the property as to destroy the interest of the seller in it; and the particulars might state some of the covenants and omit that; such a description might amount to fraud in the sale. I agree that if a purchaser had notice that the property is held under a lease, he cannot object that he had no notice of any particular covenant therein contained. He must look closely, and be active in order to ascertain whether there is any such as would materially prejudice him. The rule has perhaps been carried a little too far; it is a question of *bona fides*."

This qualification of the doctrine of *Hall v. Smith* and *Pope v.*

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(a) 3 Jo. & Lat. 506.

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*Garland* would remove the difficulty adverted to by me in the case of *Spinner v. Walsh*; and applying the test of *bona fides* to the present case, it is clear that the covenants or conditions in no way deteriorate the value of the property. I may observe that the purchaser cannot properly be said to have had notice of the circumstances connected with the plantation of Ulster, save so far as they appear on the public statute I have referred to; but I think the facts connected with such plantation may be adverted to for the purpose of showing that, when the purchaser is affected by constructive notice of covenants contained in letters patent, of which he had express notice, there is nothing unusual in those covenants, but that they were inserted under orders and conditions affecting the settlement and plantation of the entire province of Ulster—a matter not unimportant when applying the test of *bona fides*, adverted to by Sir E. Sugden.

I am therefore of opinion that the second, third and fourth exceptions should, on those grounds, be overruled.

I also think that two at least of those exceptions should be overruled, on the ground that even if the defendant had not had notice, the covenants do not affect the title.

With respect to the covenant that Peter Benson, his heirs and assigns, should have three free tenants of English or British race, blood or name, in or upon the premises, holding under the demise in said covenant mentioned, and also in respect to the covenant not to let to the "mere Irish," as in the letters patent mentioned, it appears to me that those covenants are no longer in force. I do not consider that there are any persons who now fall within the description of the "mere Irish," who, I apprehend, were the Irish who did not live within the counties of the pale; and with respect to the covenant that Peter Benson, his heirs and assigns, should have three free tenants of English or British race, blood or name, in and upon the premises, holding under the demises in the said covenant mentioned, I am of opinion that since the Act of Union every subject of the Crown, in every part of the United Kingdom, is a person of British race, blood or name, within the meaning of that covenant.

As to the remaining covenant, that Peter Benson, his heirs and assigns, should have eight culivers or muskets, and a proper number of arms to arm and accoutre eight pikemen for the defence and safety of the said Peter Benson, his heirs and assigns, and their tenants, against rebels and other enemies of the Crown, no right of entry is reserved in respect of that covenant. I much doubt that that covenant can be considered as now in force. I have already shown that this covenant was inserted in pursuance of the orders and conditions applicable to the case of every occupying tenant, to whom a grant was made, in carrying out the plantation of Ulster. I do not know how it could be contended that the Crown would be entitled to call out a standing army in Ulster, by enforcing that covenant against the representatives of the several patentees. It is not necessary, however, that I should enter into a consideration of the altered state of the law, since the covenant was entered into, by the abolition of military tenures, the declaration in the bill of rights, and the law under which a standing army is upheld, or whether the case of *Lyddal v. Weston* (a), observed upon by Sir Edward Sugden in *Martin v. Cotter*, would justify me in overruling the exception; as I have already stated my opinion, that the exception in relation to that covenant must be overruled on the ground of constructive notice.

The fifth exception is next to be considered. That exception states, that it appears by the memorial of a deed, dated the 15th of August 1749, and registered on the 28th of August 1755, that Nugent Thomas Ramsay, in the charge mentioned, upon his second marriage (which said second marriage was solemnized between him and one Jane Law), agreed to settle the lands of Castlebane, in the pleadings mentioned, upon the sons of the said marriage, and on failure thereof upon the daughters; and that it appears by the said charge that the said Nugent Thomas Ramsay left issue female of both his marriages; but it has not been in any manner shown that the reversion or reversions, remainder or remainders, expectant upon the estates tail by the said deed created, settled on the issue female of the said second marriage, is or are barred or extinguished, or is or are not still existing or available.

(a) 2 Atk. 19.

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The facts in relation to the fifth exception are these:—The lands in question were sold in one lot, and one of the denominations is Castlebane, which denomination is alone the subject of the fifth exception. Oliver McCausland, on the 4th of November 1743, executed a fee-farm grant to Nugent Thomas Ramsay and his heirs of the lands of Castlebane, subject to a rent of £5 a year. The said Nugent Thomas Ramsay, being thus seised in fee-farm of the said lands of Castlebane and his first wife being dead, executed certain marriage articles in contemplation of his second marriage with Jane Law, bearing date the 15th of August 1749, which articles were made between John Nesbit and Joseph Law of the one part, and the said Nugent Thomas Ramsay, by the name of Nugent Ramsay, of the other part.

The articles are very inartificially framed. By those articles the said Nugent Ramsay did oblige himself in the penalty of £500, in consideration of the marriage, and the other considerations therein mentioned, “to settle on the said Jane Law, in failure of the said Nugent Ramsay’s eldest daughter Rebecca Ramsay, which he had by a former wife, and a marriage settlement made thereby, settled the lands of Knockfair in said county; and in case the said Jane Law should survive the said Nugent Ramsay, he obliged himself to settle the sum of £15 yearly on said Jane Law, during her natural life, by way of jointure, the remainder of said lands of Knockfair on the issue male of the eldest of them begotten on the said Jane; and in case of failure of issue male, to be divided on the female issue so begotten; and also the lands of Castlebane, which were then in possession of the said Nugent Ramsay and not settled; and in case Rebecca Ramsay, eldest daughter to the said Nugent Ramsay should survive, and that the said lands of Knockfair should not be made good, that then the said lands of Castlebane should be subject to the said £15 a-year jointure, and settled on the said eldest son of the said marriage; in failure of the said son, on the daughters of said marriage.”

Nugent Thomas Ramsay, called in the articles of 1749 Nugent Ramsay, died previously to 1763, without male issue, leaving Rebecca his daughter by his first marriage him surviving, and also

leaving three daughters by his second marriage, Jane, Margaret and Elizabeth.

In 1764 Rebecca married William Harrison, who died soon after, leaving Roger Harrison issue of said marriage, and Rebecca him surviving. On the 15th of April 1769 Rebecca married Æneas Murray. Æneas Murray died in 1796, leaving Rebecca him surviving, and she is dead many years. Her heir-at-law is one William Harrison, her great-grandson.

It has been contended on the part of the defendant that, upon the true construction of those articles, and in the event which took place of Rebecca, the daughter of Nugent Ramsay by his first marriage, surviving, the lands of Castlebane became subject to limitations similar to those which the lands of Knockfair would have been subject to, if Rebecca had died without issue; and that upon the authority of *Hart v. Middlehurst* (*a*), and that class of cases, the articles should be carried into execution by limiting the lands of Castlebane in strict settlement—that is to say (there having been no issue male of the marriage), to the daughters of the second marriage as tenants in common in tail.

It has been further contended by the defendant's Counsel that upon the death of Nugent Ramsay the legal estate in the lands of Castlebane descended to his four daughters, viz., to Rebecca, the daughter of the first marriage, and to his three daughters by the second marriage, subject to the trusts I have stated in the articles of 1749; that no recovery was suffered by the three daughters of the second marriage, and that the reversion in fee in one-fourth of the lands, which descended on Rebecca, remains vested in the heir-at-law of Rebecca unbarred.

In Trinity Term 1783, a fine was levied of the said lands of Castlebane by Jane Ramsay, the widow of Nugent Ramsay (in the fine called Nugent Thomas Ramsay), and by John Park and Jane his wife, James M'Ghee and Margaret his wife, and Elizabeth Ramsay, to Æneas Murray and his heirs, who at that time was husband to Rebecca. Jane Park, Margaret M'Ghee, and Elizabeth Ramsay, were the three daughters of the said Nugent Thomas

(*a*) 3 Atk. 371.

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Ramsay and Jane Ramsay, otherwise Law, his wife.\* The plaintiffs in this suit derive under *Æneas Murray*.

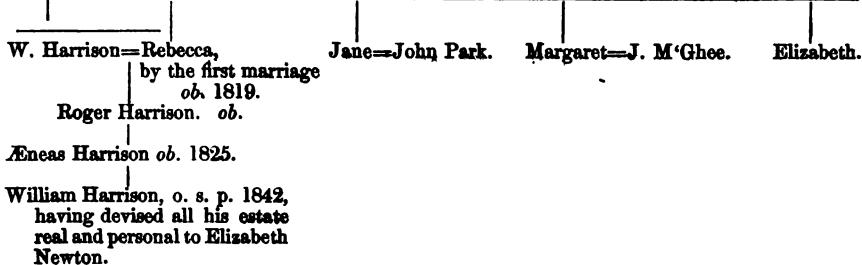
The deed leading the uses of the fine bears date the 10th of May 1783, and was executed by the said several parties, who levied the fine to the said *Æneas Murray*. The lands were conveyed to him and his heirs in consideration of £520; and the conveyance contains the usual covenants as to title, and that the said conveying parties, or some of them, were seised of an absolute and indefeasible estate in fee-simple. The deed also contains a covenant to levy a fine, which was accordingly levied, as I have already stated, and a covenant for further assurance.

Several conveyances were executed since 1783, exclusive of mortgages. They may be shortly stated as follows:—

*Æneas Murray* having died intestate in 1797 without issue, his brother *Roger Murray* entered into possession of Castlebane as his heir-at-law, and on the 3rd of December 1803 conveyed, for valuable consideration, the said lands of Castlebane, so held in fee-farm, to *Sir Andrew Ferguson* and his heirs. *Sir A. Ferguson* devised said lands to his son *Sir Robert Ferguson*, subject to a life estate to his widow.

On the 28th of May 1825, the widow and *Sir Robert Ferguson*, for valuable consideration, conveyed said lands to *John Cochrane* and his heirs. On the 19th of April 1828, *John Cochrane*, for valuable consideration, conveyed to *Henry Stewart* and his heirs. The plaintiffs derive under *Henry Stewart*.

\* *Nugent Thomas Ramsay ob. 1763.*



The defendant's Counsel first contend that the legal estate in one undivided fourth of the said lands is now outstanding in the heir-at-law of Rebecca. That as to said undivided fourth, an equitable base fee was only conveyed to *Aeneas Murray* by the deed and fine of 1783; and that on the failure of issue of the three half sisters of Rebecca, the base fee in that fourth would determine, and the heir-at-law of Rebecca become entitled to a beneficial interest in the said undivided fourth. And the defendant's Counsel, secondly, contend that, even if the legal estate in the undivided fourth is not outstanding in the heir-at-law of Rebecca, that on the determination of the equitable base fee he would be entitled to a beneficial interest in an undivided fourth, no recovery having been suffered to bar the reversion expectant on the equitable estate tail, to which it is said the three daughters of Nugent Thomas Ramsay, by his second marriage, were entitled under the articles of 1749.

With respect to the legal estate. I shall first consider Rebecca's legal title as co-parcener; secondly, her legal title in her alleged character of trustee.

As to any title she had as co-parcener, I am of opinion that it is at an end. On the death of Nugent Thomas Ramsay, in or previous to 1763, the legal estate descended on Rebecca and her three half sisters as co-parceners. It appears to me to be quite clear that the right of Rebecca in her character of co-parcener is barred by the operation of the 2nd, 12th and 15th sections of the 3 & 4 W. 4, c. 27.

The construction of those sections was fully considered in the case of *Lessee Sullivan v. M'Swiny* (a), and the cases there referred to.

The question then is, whether the legal title of Rebecca and her heir-at-law is to be considered unaffected by the Statute or Statutes of Limitations, on the ground that she and her three half sisters were entitled to the lands as trustees, subject to the trusts of the articles of 1749?

There is no doubt that previous to the 3 & 4 W. 4, c. 27, where a clear relation of trustee and *cestui que trust* existed, the possession of the *cestui que trust* was not adverse to the trustee. Courts of

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(a) Longf. & Town. 119.

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Law considered the *cestui que trust* as tenant at will to the trustee, and that the possession by the *cestui que trust*, where, in accordance with the trusts in the deed creating the trust, was not adverse : *Keane v. Dundas (a)*.

The 7th section of the 3 & 4 W. 4, c. 27, enacts, that in the case of a tenant at will the right to make an entry or distress, or to bring an action, shall be deemed to have first accrued at the determination of such tenancy, or at the expiration of one year after the commencement of such tenancy. In order, however, to prevent this enactment applying to the case of mortgagor or *cestui que trust*, it is provided that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee.

Mr. Smith, in a learned note to the *Leading Cases*, 1st ed., vol. 1, p. 411 (b), appears to consider that the 7th and previous sections left the law as to *cestui que trust* and trustee as it was, so far at least as express trusts were concerned. In p. 412 he considers the case of implied trust, and seems to doubt whether, in case of an implied trust, the *cestui que trust* is tenant at will.

The question in the present case, in determining whether the legal title of Rebecca in the undivided one-fourth is barred by the statute, is, whether a Court of Law, in considering the question of adverse possession, previous to the 3 & 4 W. 4, c. 27, or now in considering that statute, or its operation, could be called on to decide a question of executory trust, Courts of Equity in such cases not construing technical words with legal strictness, but moulding the trust according to the intent of the creator of the trust.

In my opinion a Court of Law would not have entered, and would not now enter, into any consideration of an executory trust, or how a Court of Equity would carry into execution the articles of 1749, and would not consider or decide whether the relation of trustee and *cestui que trust* existed between Rebecca and the parties claiming beneficially under said articles, and would not hold in such a case as this that the parties claiming beneficially and in possession were

(a) 8 East, 248.

(b) Note to *Taylor v. Horde*, vol. 2, pp. 406, 411, 412, last ed.

tenants at will. In the case of *The King v. Toddington* (*a*), Mr. Justice Holroyd, a very able Judge, stated :—" Where there is a conveyance to uses not executed, or on trusts stated on the face of the deed, the one party has the equitable, and the other the legal, estate ; and in these cases, for collateral purposes, a Court of Common Law will take notice of such an equitable estate. An equitable estate, however, is very different from an equitable right to have a conveyance of the legal estate." Mr. Justice Holroyd adds :—" Here the party had only the latter, and if there be any doubt as to what a Court of Equity would do, this Court cannot take cognizance of the estate."

In the case of *Rex v. Geddington* (*b*), the same doctrine was stated, and the law as laid down in the case of *The King v. Toddington* recognised ; and the Court of Exchequer in this country, in the case of *Orpen v. Moore* (*c*), recognised and acted on the authority of those cases.

I am therefore of opinion that a Court of Law would not enter into an inquiry and decide how a Court of Equity would have carried, or would carry, the articles of 1749 into execution. If not, a Court of Law could not hold that the parties deriving under the fine and conveyance of 1783, and the subsequent conveyances, stood in the position of tenants at will to Rebecca. If not, the legal title is barred.

Independently of that question, however, *Sir E. Sugden*, in his work on *Vendors*, p. 610, 11th ed., after stating that a *cestui que trust* is as a tenant at will to the trustee and his possession the possession of the trustee, and that therefore, unless under very particular circumstances, time would not operate as a bar, adds :— " Where a *cestui que trust* sells or devises the estate, and the vendee or devisee obtains possession of the title deeds and enters, and does no act recognising the trustee's title, there is great reason to contend that this is a disseisin of the trustee, and consequently that the Statute of Limitations will operate from the time of such entry. This is a point which daily occurs in practice ; but it rarely happens

(*a*) 1 B. & Ald. 564.

(*b*) 2 B. & Cr. 129.

(*c*) 2 Jo. 435.

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that a purchaser can be advised to dispense with a conveyance of a legal estate, where the defect will appear on the abstract when he sells; and where there has been any dealing on the legal estate, and it has been recently noticed in the title deeds as a subsisting interest, it is clear that a purchaser must consider it as such."

In this case a conveyance was executed in 1783 by the three daughters of the second marriage to Aeneas Murray and his heirs, and they covenanted that they were seised of an absolute and indefeasible estate in fee-simple. A fine was levied in the same year in pursuance of the covenant in such deed. The mere levying of the fine might not of itself have effected a disseisin of Rebecca, it being levied to her husband, who was then seised with her, and in her right, of any title she had: *Earl of Pomfret v. Lord Windsor* (b). However, subsequent to the death of Aeneas Murray, who died in 1797, there were the deeds of his brother and of Sir R. Ferguson and of John Cochrane all in succession, conveying the fee-simple for valuable consideration. I think it is impossible to consider that a Court of Law would hold that Aeneas Murray, Roger Murray, Sir R. Ferguson, and John Cochrane, were tenants at will to Rebecca, or her heir-at-law, as to an undivided fourth, or that the possession, for upwards of sixty-six years in the persons who purchased, or purported to purchase, an absolute estate in fee-simple, has been a possession consistent with the alleged right of the heir-at-law of Rebecca to a beneficial interest in an undivided fourth, in the event of the failure of issue of her three sisters of the half blood.

Rebecca was unmarried at her father's death. He died previous to 1763. She appears to have been under no disability until her first marriage in 1764. Her first husband died shortly after, and she was not again under disability until her second marriage to Aeneas Murray in 1769. He died in 1797, and then her second coverture ceased; and I am of opinion that neither Roger Murray, Sir Andrew Ferguson, Sir Robert Ferguson, John Cochrane, or Henry Stewart, stood in the relation of tenant at will to her, or her heir-at-law, and that the legal title of Rebecca and her heir-at-law is long since determined.

(a) 2 Ves. 483.

The next question which arises is, whether the equitable title or right (if any) of Rebecca's heir-at-law is barred by the Statute of Limitations?

I am of opinion that the articles of 1749 would have been carried into effect in strict settlement.

It appears from a recital in those articles that the lands of Knockfair had been settled by the marriage settlement executed on the first marriage of Nugent Thomas Ramsay, on Rebecca, his daughter by that marriage; and it was provided that, "on failure of the said Nugent Thomas Ramsay's said eldest daughter Rebecca" (by which I presume was meant her death without issue), Nugent Thomas Ramsay agreed to settle the said lands of Knockfair (subject to a jointure of £15 a-year to Jane Law) "on the issue male of the eldest of them begotten on the said Jane, and in case of failure of issue male to be divided on female issue so begotten;" and then follow the words:—"And also the lands of Castlebane, which was then in the possession of Nugent (Thomas) Ramsay, and not settled." The meaning of which is, that Castlebane was to be settled in the same manner; and then follows a provision, that "in case Rebecca should survive (an event which took place), and that the lands of Knockfair should not be made good," that then the lands of Castlebane, subject to said jointure, should be settled on "the said eldest son of the said marriage; in failure of the said son on the daughters of said marriage."

The effect of these articles appears to have been this; that in case of the death of Rebecca and the failure of limitations to her issue (if any) in the settlement on the first marriage, Knockfair and Castlebane were to be settled on the issue male and female of the second marriage; and in case of Rebecca's surviving, and the limitations of Knockfair not taking effect, Castlebane was to be settled in the same way. The question then is, how the executory trust, as to Knockfair, was to be carried into effect, if Rebecca had died without issue?

The case of *Hart v. Middlehurst* (a) appears to me to be a clear authority upon the construction of those articles. That was a case

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(a) 3 Atk. 371.

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of marriage articles for conveying lands in trust for the husband for life, and afterwards to the wife for life, and afterwards to the issue of the marriage, in such manner and subject to such charges for younger children as the husband should by deed or will appoint.

Lord Hardwicke held that a daughter, the only issue of the marriage, was entitled, under an equitable execution of those articles in strict settlement, to an estate tail. Issue of the marriage, he said, included "male as well as female; and therefore if it had gone no further than the issue of the marriage, and a bill had been brought for carrying the articles into execution, the settlement must have been to all the issue, to the first and every other son, and for default of such issue to the daughters, with proper remainders following one after the other;" and that he had "known several decrees of that kind upon the words 'issue of the marriage.'" And though by the words subjecting the provision to the father's appointment, he "might have divided the estate amongst the children, a different part among the sons if he pleased, and another part by way of provision for the daughters, still the whole of the estate must have been divided, though the proportion was left to the father."

Other cases to the same effect are referred to in *Fearne on Contingent Remainders*, p. 105, and the prior and subsequent pages.

If the construction of the articles of 1749 is clear, and I find it impossible to distinguish the case from *Hart v. Middlehurst*, the case of *Thompson v. Simpson* (a) establishes that the Statute of Limitations, in such a case as this, does not apply until the time when the party seeking the remedy becomes himself entitled to an estate in possession.

The heir-at-law of Rebecca would not become entitled to an estate in possession until the determination of the base fee, conveyed by the fine of 1783, by the failure of the issue of the three half-sisters of Rebecca, who were entitled to an estate tail under the articles of 1749.

The plaintiff's Counsel, feeling the difficulty of this exception, argued that the Court might presume that the articles of 1749 had been carried into execution, previous to the levying of the fine of

(a) 1 Dr. & War. 459.

1783, and that if the three daughters of Nugent Thomas Ramsay by the second marriage had legal estates tail, prior to the fine of 1783, the fine operated as a discontinuance, and as the writ of formedon has been taken away, the reversion in Rebecca or her heir-at-law was in such case effectually barred.

In support of this argument Counsel referred to *Sir E. Sugden's work on Vendors*, 11th ed., pp. 633, 634, paragraph 87. Sir E. Sugden says:—"Base fees are frequently created, but it is seldom, if they do not quickly determine, that they are not enlarged into pure fees. I do not remember more than one instance of a conveyance, by way of transfer, of a base fee actually in existence; and it rather seems that those created before the Act by tenant in tail in possession are by another section rendered unassailable. It may be assumed generally that whenever such a tenant in tail created a base fee, he discontinued the remainder or reversion, and turned it to a right, and therefore the remainderman or reversioner was driven to his formedon upon the determination of the estate tail. Now, the Act abolishes all such real actions, and contains, as we have seen, but two savings; one allowing real actions to be brought before the 1st of June 1835, which has now ceased to operate; and the other that when, on the 1st of June 1835, any person whose right of entry shall have been taken away by any descent cast, discontinuance or warranty, might maintain any such suit or action (which includes formedon), such suit or action may be brought after the 1st of June 1835, but only within the time allowed by this Act. If therefore a base fee had still continuance on the 1st of June 1835, yet a remainderman, whose right of entry had been taken away by discontinuance, might not maintain any such suit or action, until the determination of the base fee; and consequently it seems that his remedy is taken away by the 36th section, which abolishes real actions, and is not saved by the subsequent sections. This, probably, was not the intention; but if the Act was intended to save to such persons the same right as to time as was given to those whose right of entry had not been taken away, that might have been clearly expressed, although it had been deemed proper still to leave such persons to their real action. A statute, however, which

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allowed only six months to present claimants to bring real actions, might, consistently with that provision, take away all power to bring such an action where no present right existed. Still this would leave the question open as to base fees where there was no discontinuance."

I do not think the Court would be at liberty to compel a purchaser to accept a title founded on such a presumption.

If, however, Sir E. Sugden's view of the statute be correct, there is strong ground for saying that the title is good without any presumption that the articles of 1749 were carried into execution by a conveyance of the legal estate; because it is enacted by the 24th section of the Statute of Limitations that no person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which, by virtue of the provisions thereafter contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest or right in or to the same as he shall claim therein in equity; and if the reversion would have been barred, supposing the estates to have been legal, there is ground for contending that a Court of Equity should hold that the reversion, after the equitable estate in this case, was also barred, although in equity a fine creates no discontinuance.

The case of *Doe v. Ross* (a) is, for the reasons suggested by Mr. Warren, not at variance with what Sir Edward Sugden states in the passage of his work to which I have referred. Baron Parke, in giving the judgment of the whole Court, after time taken to consider—after stating that a certain fine, levied by a tenant in tail, had operated as a discontinuance, and turned the remainders over into mere rights of action, added:—"And the estate taken by the couzor, by virtue of the fine and declaration of uses, was not a base fee, or determinable fee on failure of issue inheritable under the original estate tail, but strictly and properly a fee-simple, defeasible by the remainderman in tail by bringing a real action. It follows (added Baron Parke) that, until defeated by that mode, the fee-simple

(a) 7 M. & W. 123.

continues in and descends from the conuozor." The rule is laid down in the same way in 1 *Preston on Conveyancing*, p. 7.

Baron Parke, in the same case, states :— "The late Real Property Act (3 & 4 W. 4, c. 27) does not appear to raise any question in this case. The rights of the remainderman to a formedon are preserved by the 38th section." In that case the base fee determined in 1832, and therefore the 38th section reserved the right to bring a writ of formedon. In this case the equitable base fee is still subsisting, and the 38th section would not have applied if the estates had been legal in 1783 ; and therefore, according to the view taken by Sir Edward Sugden, the reversioner, if the estate had been legal, would have been barred. This question was not raised or argued before me, irrespective of the question that I should presume that the articles were carried into execution before 1783, which I am of opinion I cannot do ; and although the impression upon my mind is, that the title is good upon the ground which was not argued, yet, keeping in mind that a fine creates no discontinuance in equity (*Preston's Conv.* p. 262), the title would be too doubtful upon the question raised by the purchaser by the fifth exception to force it on him. The cases as to doubtful titles are collected in 1 *Sugd. on Vendors*, 11th ed., p. 505, and subsequent pages.

I have felt some difficulty as to the form of the order which I should make on the fifth exception ; but upon the grounds stated by Sir E. Sugden, in p. 511 of his work, last ed., I apprehend, notwithstanding the case of *Jenkins v. Herries* (a), I am bound to allow the exceptions where I think the title is too doubtful to compel the purchaser to accept it. I shall therefore allow the fifth exception, the Court declaring that the title to the interest in Castlebane is too doubtful on the point raised by this exception to compel the defendant to accept it. The plaintiff's Counsel have stated that they cannot, upon the facts of the case, raise any question upon the 21st or 22nd sections of the 3 & 4 W. 4, c. 27. I therefore offer no opinion on those sections.

The sixth, seventh, eighth and ninth exceptions may be disposed of together. They relate to all the lands, except the fee-farm estate of Castlebane, which is the subject of the fifth exception.

(a) 4 Mad. 67.

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The sixth exception is, that the recovery suffered by John M'Causland, and his eldest son Oliver, as of Trinity Term 1781, is invalid, the deeds of the 9th and 10th of October 1781, which it is alleged in the abstract of title were executed to create a tenant to the præcipe, bearing date and having been executed after the end of the Term of which the said alleged recovery was suffered.

The seventh exception is, that in the exemplification of the recovery of 1781, John M'Causland appeared by attorney, but no summons to warranty is stated, or appears to have been mentioned on the recovery roll, nor has it been shown that there was any sufficient summons to warranty, or any sufficient warrant of attorney, to authorise the appearance.

The eighth exception is, that there was not a sufficient tenant to the præcipe in the recovery of Michaelmas Term 1786, stated in the abstract of title.

The ninth exception makes the same objection to the recovery of 1786 as is by the seventh exception made to the recovery of 1781.

On the 14th of February 1787, John M'Causland and Oliver M'Causland, the former being tenant for life, and the latter tenant in tail of the lands, conveyed the same to Henry Stewart and his heirs.

If any valid recovery was suffered prior to that deed by John and Oliver the title is good, so far as the exceptions under consideration are concerned.

It appears that a deed, creating James Orr a tenant to the præcipe, was executed by John and Oliver M'Causland on the 13th of June 1780. The abstract of title states that a recovery was suffered by them in Trinity Term 1780. There is no evidence of that recovery except the deed creating the tenant to the præcipe. That deed, however, is either evidence under the 21 G. 2, c. 11, s. 5, *Ir.* (which corresponds with the English Act of the 14 G. 2, c. 20, s. 4), that a recovery was suffered in 1780; or if there was no recovery in 1780, then there was a sufficient tenant to the præcipe in 1781, James Orr appearing on the record of the recovery of 1781 to be tenant to the præcipe in said recovery. Mr. Fitzgerald, for the defendant, has admitted this, and relies on the objection in the seventh exception as invalidating the recovery of 1781.

It has been contended that the tenant in tail must be vouched, and that if the tenant for life was not before the Court, there was no voucher of the tenant in tail; that the warrant of attorney is the foundation of the recovery, and that there is no summons to warranty on the recovery roll, and it does not appear that there was any warrant of attorney to authorise the appearance for the tenant for life.

By the record James Orr, the tenant to the præcipe calls to warranty John M'Causland, who, by Andrew Reed, his attorney, is present here in Court, and freely warrants, &c. John M'Causland was tenant for life; Oliver M'Causland, the tenant in tail, appeared in person. I am of opinion that the objection is not sustainable. In the case of *Wynne v. Lloyd*, reported in *Levinge, Siderfin* and *Sir Thomas Raymond*, and in *Vin. Abrid.*, oct. ed., vol. 18, p. 236, a writ of error was brought of a common recovery. The second error alleged was that there was no warrant of attorney at the time of the appearance; for it appears to be tested after the appearance; but to this it was answered that the vouchee may appear himself, or by attorney, though there be not any summons or other proof against him, and that so are 18 *Edw. 2*; *Fitz. Voucher*, p. 230; 5 *Edw. 3*; *Fitz. Voucher*, p. 197; 13 *Hen. 7*, p. 24, and other books, and that therefore the common recovery is good, and the process void; and the Court, after several arguments, said that a common recovery being a common assurance, they would intend another warrant of attorney made in due time, and that they would not reverse a common recovery, if by any means they could make it good, and so affirm it.

In *Pigot on Recoveries*, after advertting to the practice, that there are nine returns on every summons to warranty in England in adversary suits, and to the English Act, 16 *Car. 2*, c. 6, reducing the number of returns to five in common recoveries, the author adds:—"The returns are not abridged in this case in Ireland, but they are never observed; for where the voucher appears by attorney, they make them appear *gratis* instantly, without any day given; and though this is assignable for error, yet upon search, the precedents appearing all uniform in this point, it may be said *communis*

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*error facit jus*, and therefore it has not been thought advisable to bring a writ of error on this defect."

These authorities appear to me to be against the seventh exception, which raises the same question with respect to the recovery of 1786.

With respect to the eighth exception, it is not necessary to decide on the objection, that there was no sufficient tenant to the praecipe to the recovery of 1786, because, being of opinion that the estate tail of Oliver M'Causland was barred either by the recovery of 1780 or 1781, an exception cannot be taken to the Master's report of good title, even though there was not a sufficient tenant to the praecipe in the recovery of 1786.

With respect to the tenth exception, it appears to me that the document, being dated the 28th of June 1788, and signed by Henry Stewart, and by James Orr, attorney for Oliver M'Causland, is an answer to that exception.

I am of opinion that the several exceptions must be overruled, with costs, except the fifth. I have already stated the order which I shall make on the fifth.

This case not having been set down for further directions, I cannot make any order as to dismissing the bill or otherwise. Counsel for the plaintiff has stated that the course adopted by setting down the cause only on the exceptions was adopted in accordance with the authorities referred to in *Grant's Chan. Practice*, p. 47, 5th ed. I offer no opinion on the question of practice.

Allow the fifth exception, without costs, the Court being of opinion that the title to the estate and interest in the lands of Castlebane is too doubtful on the point raised by the said exception to compel the purchaser to accept the title. Overrule the several other exceptions, with costs, and let the deposit be returned to the defendant. Refer it to the Taxing-master to tax said costs.

*Rolls Hearing Book, 21, fol. 41.*

*Mr. Hamilton Smythe*, for the defendant, now moved that the bill might be dismissed, with costs. He contended that the Court having decided against the title, the proper course was to move to dismiss the bill; and that the Court could make the order without setting down the cause: *Sug. on Vendors*, p. 417, 11th ed.; *Whitcomb v. Foley* (*a*).

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Argument.

*Mr. Robert R. Warren*, for the plaintiff, moved a cross notice, that it might be referred back to the Master to review his report, dated the 3rd of May 1849, so far as regarded the subject-matter of the fifth exception to the said report, and to inquire and report whether a good title could be made to the lands mentioned in said exception. He cited *Egerton v. Jones* (*b*); *Andrew v. Andrew* (*c*); *Curling v. Flight* (*d*).

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Judgment.

I have looked into the authorities cited by Mr. *Warren*, and they appear to me to support his motion. In *Curling v. Flight*; Lord Cottenham draws a distinction between cases of specific performance and other cases. In the former, if the Master reports in favour of the title, and exceptions to the report are allowed, the Court does not discharge the purchaser at once. The regular practice appears to be to refer the matter back to the Master. The course which I mean to adopt is to amend the order of last December, so as to make it exactly in the form of Lord Cottenham's order in *Curling v. Flight*.

No rule on the original motion, and let the order made in this cause, bearing date the 20th of December 1849, be amended by adding thereto as follows—that is to say:—  
“And it is further ordered that it be referred back to William Brooke, Esq., the Master in this cause, to review his said report, and to inquire whether a good title can be made to the lands in the said report mentioned.”

*Rolls Motion Book*, 294, fol. 310:

- (*a*) 6 Mad. 3.  
(*c*) 3 Sim. 390.

- (*b*) 3 Sim. 392.  
(*d*) 2 Phil. 613.

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Jan. 23.

*Statement.*

On the 10th of December 1849 the plaintiffs procured a conveyance of all their right, title and interest in the lands of Castlebane from Susan Elizabeth Newton, who was devisee of William Harrison, the heir-at-law of Rebecca Ramsay, and Henry Newton her husband.

The case went back to the Master's office under the orders of the 20th of December 1849, and 31st of January 1850; and the Master, by his report dated the 1st of November 1850, found that a good title could be made to the lands, and that the plaintiffs showed a good title on the 10th of July 1850. The deed of the 10th of December 1849 is fully stated in the judgment. The articles of the 5th of August 1749 were not produced. Affidavits were made stating a search for the deed, and the memorial of it was produced and acted on by the Master in his former report, and adopted by the defendant as the foundation of his former exceptions.

Six exceptions were taken by the defendant to the report of the 1st of November 1850.

First—That title was attempted to be derived under the articles of the 15th of August 1749, by the defendant's supplemental charge, and that it was stated that the articles were not forthcoming, and that there was no condition of sale dispensing with the production of the said articles.

Secondly—That no sufficient foundation was laid for secondary evidence of the said articles.

Thirdly—That no sufficient secondary or other evidence had been given of the contents of the said articles.

Fourthly—That it had not been shown that the reversion or reversions, remainder or remainders, in the lands of Castlebane, expectant on the estates tail of the issue female of the second marriage of Nugent Thomas Ramsay, was or were barred or extinguished, or conveyed to the plaintiff, or not still subsisting.

Fifthly—That it was stated by the rental that the timber on the estate would be included in the purchase, and yet one holding, No. 21, was held under a lease of the 22nd of April 1843, whereby a part of the lands, with all trees, &c., were granted in fee-farm; and at the time the defendant agreed to purchase there was a great quantity of timber trees of many years' growth, and of great value,

growing upon the said holding (No. 21), and therefore the statement that the timber on the estate would be included in the purchase was a misrepresentation.

The sixth exception was similar to the fifth, and related to another holding (No. 2), which was held under a lease for lives renewable for ever, of the 7th of January 1798, whereby liberty was given to the tenant to cut all timber, trees, &c., then standing or growing, or which might thereafter be planted and growing, on the premises.

Mr. *Hamilton Smythe* and Mr. *F. A. Fitzgerald*, in support of the exceptions.

Mr. *R. R. Warren* and Mr. Serjeant *Christian*, for the plaintiffs.

On the first three exceptions: *Hart v. Middlehurst* (a); *Thompson v. Simpson* (b); *Bryant v. Bush* (c); *Southby v. Hutt* (d); *Rockard v. Fulton* (e); *Cousmaker v. Sewell*; *Sug. on Vendors*, 11th ed., Ap. 1095; *Biggs v. Sadlier* (f); *Scully v. Scully* (g); *Peyton v. M'Dermott* (h); *Medlicot v. Joiner* (i).

On the fourth exception: *Church v. Edward* (k); 3 *Preston Con. Merger*, p. 90; *Oakley v. Smith* (l); *Helps v. Hereford* (m); 4 *Inst.* p. 85; *Doe d. Christmas v. Oliver* (n); *Weale v. Lower* (o); *Blake v. Foster* (p); *Cole v. Sewell* (q); 2 *Preston Com.*, p. 203; *Wyche v. East India Company* (r); *Gilbert on Uses*, p. 429, note; *Jessop v. King* (s); *Watk. on Descent*, p. 483; *Com. Dig. Fine*, T; *Shepherd's Touchstone*, p. 27; *Doe v. Hutton* (t); *Goodright v. Seale* (u).

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| (a) 3 <i>Atk.</i> 371.   | (b) 1 <i>Dr. &amp; War.</i> 459. |
| (c) 4 <i>Russ.</i> 4.  | (d) 2 <i>M. &amp; Cr.</i> 207.   |
| (e) 1 <i>J. &amp; Lat.</i> 413; S. C. 7 <i>Ir. Eq. Rep.</i> 131. | (f) 10 <i>Ir. Eq. Rep.</i> 522.  |
| (g) 10 <i>Ir. Eq. Rep.</i> 557.                                  | (h) 1 <i>Dr. &amp; Wal.</i> 198. |
| (i) 1 <i>Mod. 4.</i>   | (k) 2 <i>Br. C. C.</i> 180.      |
| (l) <i>Ambl.</i> 368.  | (m) 2 <i>B. &amp; Ald.</i> 243.  |
| (n) 10 <i>B. &amp; Cr.</i> 181.                                  | (o) <i>Pol.</i> 64.              |
| (p) 8 <i>T. R.</i> 487.  | (q) 4 <i>Dr. &amp; War.</i> 14.  |
| (r) 3 <i>P. Wms.</i> 309.  | (s) 2 <i>Ball &amp; B.</i> 94.   |
| (t) 3 <i>Bos. &amp; Pul.</i> 643.                                | (u) 2 <i>Wils.</i> 29.           |

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As to the fifth and sixth exceptions: *Dykes v. Blake* (*a*), and *Sugden on Vendors*, 11th ed., p. 34, and cases there referred to, were cited.

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April 16.

Judgment.

The MASTER OF THE ROLLS.

The bill was filed in this cause against the defendant to compel the specific performance of an agreement, dated the 24th of April 1845, for the purchase of the Tyrcallen estate.

The usual order of reference was made to the Master on the 24th of May 1847, whereby it was referred to him to inquire and report whether or not the plaintiffs could make a good title to the estate, the subject-matter of the contract of the 24th of April 1845, and if so, at what time the plaintiffs showed a good title. The Master made his report on the 3rd of May 1849, whereby he reported that the plaintiffs could make a good title to the said estate, and that they showed a good title on the 29th of January 1849.

Ten exceptions were taken by the defendant to the Master's report. The exceptions having been argued before me, I made an order in Michaelmas Term 1849, dated the 20th of December in that year, overruling all the exceptions except the fifth, which I allowed, declaring that the title to the interest in Castlebane, a small portion of such estate, was too doubtful on the point raised by that exception to compel the defendant to accept it; and it having been alleged on the part of the plaintiffs that the objection to the title, raised by the fifth exception, could be removed by a conveyance from the heir-at-law of Rebecca Ramsay, the case stood over, and eventually the order was amended on the 31st of January 1850; and it was referred back to the Master to review his report, and to inquire and report whether a good title could be made to the said lands.

The Master made his report on the 1st of November 1850, under the orders of the 20th of December 1849, and 31st of January 1850, and he finds thereby that the plaintiffs can make a good title to the said lands, and that the plaintiffs showed a good title on the 11th of July 1850.

(*a*) 4 Bing. N. C. 476.

Six exceptions have been taken to the said report. The first, second and third exceptions may be considered together.

The first exception is, that by the supplemental charge filed by the plaintiffs the title to the lands of Castlebane, which form a small part of the estate sold, is attempted to be derived under the articles of the 15th of August 1749, which were registered on the 28th of August 1755, and that it is stated in the supplemental charge that the said articles are not forthcoming, but that there is no condition of sale dispensing with the production of the said articles.

The second exception is, that no sufficient foundation is laid for the reception of secondary evidence of the said articles of the 15th of August 1749, in the said supplemental charge stated to have been made on the marriage of Nugent Thomas Ramsay with Jane Law.

The third exception is, that no sufficient secondary evidence has been given of the contents of the said articles.

I am of opinion that the first, second and third exceptions have not been sustained.

The fifth exception taken by the defendant to the Master's former report, and which exception was allowed, relies on those articles of the 15th of August 1749 as creating an objection to the title. That exception was allowed. The memorial appears in the schedule to the first report, unobjected to. The defendant now contends that although he relied on the memorial of the registry of those articles as evidence to sustain the fifth exception to the former report, and succeeded on said exception, and although in the commencement of his present exceptions he refers to the former exceptions "heretofore taken to the said last mentioned report, of the 3rd of May 1849, and on which the said defendant still relies," yet that he is at liberty now to insist that there is no legal evidence of the said articles.

I do not understand how a party can be at liberty successfully to rely on the memorial of a deed as creating an objection to the title, and, when such objection has been removed, to contend that the document relied on by himself is no evidence.

If, however, the objection was open to the defendant, it appears

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to me that the affidavits which have been produced as to the search made for the articles have laid a sufficient foundation for the reception in evidence of the memorial as secondary evidence of the articles.

I shall therefore overrule the first, second and third exceptions.

It is insisted by the fourth exception that it has not been shown that the reversion or reversions, remainder or remainders, in the lands of Castlebane, expectant on the estate tail of the issue female of the second marriage of Nugent Thomas Ramsay, was or were barred or extinguished, or was or were conveyed to the plaintiffs, or was or were not still existing and available.

The facts of the case which relate to this exception were so fully stated in the judgment given on the fifth exception taken to the former report, that it is not necessary to repeat the statement. The question is, whether the objection has been removed by the deed which bears date the 10th of December 1849? That deed was made and executed by and between Henry Newton and Susan Elizabeth Newton, otherwise Harrison, his wife, of the one part, and the plaintiffs of the other part. It recites that at the time of the execution of the articles of the 15th of August 1749, Nugent Thomas Ramsay was seised in fee-farm of the lands of Castlebane, and that by those articles the said Nugent Thomas Ramsay, in consideration of his then intended marriage with Jane Law, covenanted to assure the said lands, in the event of the failure of sons of the said marriage, unto the daughter or daughters of the said marriage.

It further recites that there was not any son issue of the said marriage, and that there was issue of the said marriage only three daughters, viz., Jane, Margaret and Elizabeth Ramsay, and that all the estate of the said Jane, Margaret and Elizabeth is now vested in the plaintiffs.

It further recites that Nugent Thomas Ramsay died in or about the year 1763, leaving said three daughters, and also leaving Rebecca Ramsay, a daughter by a previous marriage, his four co-heiresses-at-law, him surviving.

It further recites that Rebecca Ramsay married first one William Harrison; secondly Aeneas Murray, and died previous to 1819,

leaving her grandson, *Aeneas Harrison*, her surviving; that said *Aeneas Harrison* died in or about the year 1825. intestate, leaving William Harrison his eldest son and heir-at-law.

It further recites that the said William Harrison duly made and published his last will in writing, dated the 28th of October 1842, attested as by law then required to pass real estates by devise, and thereby devised all and every description of property, of which he should die seised, possessed of, or entitled unto, be the same real, personal or freehold, or otherwise, and wheresoever situate, unto the said Susan Elizabeth Newton, then Harrison, his wife, and afterwards died somewhere in the year 1842, without having altered or revoked his will.

It further recites that said Susan Elizabeth hath since married the said Henry Newton, her present husband.

It further recites that doubts have been entertained whether the said Jane, Margaret and Elizabeth Ramsay took estates in tail, with cross remainders between them, or estates in fee-simple, under the said deed of the 15th of August 1749, in the said lands of Castlebane, and whether a reversion in fee in said lands did, or did not, result to the use of the said Nugent Thomas Ramsay.

It further recites that the said Susan Elizabeth Newton is now seised of the reversion in fee-simple expectant upon the failure of all the issue of the said Jane, Margaret and Elisabeth Ramsay, in one undivided fourth part of the said lands of Castlebane, in case such reversion did result to the said Nugent Thomas Ramsay, and in case her title to the same is not barred by the Statutes of Limitation.

It further recites that the plaintiffs are desirous that all doubts should be removed; and the said Susan Elizabeth Newton and Henry Newton, her husband, have consented to execute said indenture to the intent that any base fee in the said lands, now vested in the plaintiffs, should be enlarged into a fee-simple absolute; and after said recitals, it is by said indenture of the 10th of December 1849 witnessed that, in consideration of five shillings, they the said Henry Newton and Susan Elizabeth, his wife, did grant, release and confirm to the said plaintiffs and their heirs the said lands of Castlebane and all their respective estates and interests therein,

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to have and to hold to the plaintiffs and their heirs, to the intent that any base fee in the said lands, or any part thereof, now vested in the plaintiffs, may be enlarged into a fee-simple absolute, to and for the sole use and benefit of the said plaintiffs and their heirs. That deed was duly acknowledged according to the statute by the said Susan Elizabeth.

I stated very fully, in giving judgment on the former argument, the view which I took of the fifth exception to the former report. It appeared to me, for the reasons which I then stated, that the legal title of Rebecca Ramsay to the one-fourth, or any portion of the said lands, was barred by the Statute of Limitations. The only claim which, in my opinion, could be set up by those deriving under said Rebecca would be an equitable right as to one-fourth of the lands, on failure of issue of her three half sisters.

It has not been disputed that Susan Elizabeth Newton is the devisee of the heir-at-law of Rebecca. The will of William Harrison is in the schedule to the report, and was read without objection. Evidence was given, and was unobjected to, showing that Nugent Thomas Ramsay, Rebecca Murray, otherwise Ramsay, and Æneas Harrison, all died intestate. The deed, therefore, of the 10th of December 1849, appears to me to vest in the plaintiffs all the right or title at law or in equity which could be put forward by any person deriving under Rebecca Murray in the one-fourth of the lands therein mentioned. It has, however, been contended that the heir-at-law of Rebecca could hereafter, on the failure of the issue of the three daughters of the second marriage of Nugent Thomas Ramsay, claim, as his heir-at-law, an equitable right to the reversion expectant on the failure of such issue. I do not concur in that argument. The fine, in my opinion, extinguished all equity whatsoever in the three-fourths which the said three daughters were, or would thereafter become, entitled to; and no person could claim any estate or interest in said three-fourths, who, although heir-at-law of Thomas Nugent Ramsay, must trace title as such heir through the said three daughters.

I am of opinion that the fourth exception cannot be sustained.

The remaining exceptions are the fifth and sixth. The fifth

exception states, that by the printed rental and particulars of sale under which the defendant agreed to purchase, it is stated that the timber on the estate would be included in the purchase, and yet the holding in No. 21 in the rental is held under an indenture of the 22nd of April 1843, whereby that part of Gortleragh, therein described, with all the quarries, royalties, and rights whatsoever thereunto belonging, were granted unto Henry Stewart, his heirs and assigns in fee-farm; and at the time the defendant so agreed to purchase there was a great quantity of timber trees of many years' growth, and of great value, growing upon the said holding No. 21, and therefore the statement that the timber on the estate would be included in the purchase was a misrepresentation.

The sixth exception states, that by the printed rental and particulars of sale, under which the defendant agreed to purchase, it is stated that the timber on the estate would be included in the purchase, and yet the holding No. 2 in the rental is held under a lease for lives renewable for ever, bearing date the 7th of January 1798, made between Henry Stewart therein named, and Robert Finlay therein named, whereby the said Henry Stewart covenanted and agreed that it should and might be lawful to and for the said Robert Finlay, his heirs and assigns, at all times during the said demise, and any future term to be added thereto, to fell, cut down, cut out, and carry away all such timber trees, of every species and kind whatsoever, that were standing or growing, or which should thereafter be planted and growing, upon the said demised premises, or any part thereof; any Act of Parliament then in force, or thereafter to be made, or any usage or custom to the contrary in anywise notwithstanding: and at the time the defendant so agreed to purchase there was a considerable quantity of timber trees of many years' growth, and of considerable value, some of which have been since cut down by the tenant, and some of which are still standing, but belong to the tenant; and therefore the statement so made, that the timber on the estate would be included in the purchase, was a misrepresentation.

The deeds of the 22nd of April 1843, and of the 7th of January 1798, are correctly stated in the fifth and sixth exceptions. The

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former deed conveys the portion of the lands therein contained in fee-farm, with all trees, quarries, royalties and rights whatsoever. The deed of the 7th of January 1798 contains the covenant in the sixth exception mentioned.

The particulars of sale under which the Trycallen estate was sold to the defendant states that "the timber on the estate will be included in the purchase." It further states that "the timber was carefully valued in detail, about three years since, by Mr. James Frazer, of Dublin, without any consideration for ornamental value; and he was requested also by the proprietors to estimate very moderately. The amount of Mr. Frazer's valuation was £11,647. But although the proprietors have no doubt this was the fair value, they do not expect to realise the amount stated. The larch is generally of superior quality and growth, and of dimensions, sufficient for railway purposes—a proof of which is, that the proprietors of the estate have shipped upwards of £1000 worth to the town of Liverpool. The thinnings of the plantations at present yield a considerable annual income." The particulars of sale contain a condition, that "if any mistake be made in the description of the premises, or any other error whatsoever shall appear in the particulars of the estate, not provided against by the previous conditions, such mistake shall not annul the sale, but a compensation or equivalent shall be given or taken as the case may require, such compensation or equivalent to be settled by two referees, or their umpire; each party, within ten days after the discovery of the error, and notice thereof given to the other party, to appoint one referee by writing; and in case either party shall neglect or refuse to nominate a referee within the time appointed, the referee of the other party alone may make a final decision. If two referees are appointed, they are to nominate an umpire before they enter upon business; and the decision of such referee or umpire, as the case may be, shall be final."

The rental which forms part of the particulars of sale states the denominations twenty-eight in number, and the names of each of the twenty-eight tenants, also the nature of the tenancy, the number of acres in each holding, and the annual rent. The total number of acres in the hands of tenants is 669*A. 1*m.* 30*r.**, the annual rent

£415. 4s. 1d. In addition to the portion of the lands in the hands of tenants, there are stated to be demesne lands in hand containing 200A. 3R. 30P., estimated rent £175. 15s.; lands under plantation in hand containing 263A. 0R. 7P.; estimated rent £100. 17s. 10d. The mansion, offices, garden, &c., in hand containing 4A. 2R.; estimated rent £50.

The total acreage of the land in lease and in hand is thus 1137A. 3R. 27P., and the rent payable by the tenants, and the estimated rent of the portion in hand, make together £741. 16s. 11d.

The lands No. 21 in the rental, in the fifth exception mentioned, contain only 19A. 2R. 3P., and are held at a rent of £7 a-year.

The lands No. 2 in the rental, in the sixth exception mentioned, only contain 5A. 34P., and are held at an annual rent of £7. 2s. 2d.

The question on the fifth and sixth exceptions is, whether the timber on the Tyrcallen estate, having been included in the purchase, the inability to make out title to this timber on No. 21 and No. 2 entitles the defendant to be discharged from his purchase? I do not think that there is a misrepresentation on the rental, so as to entitle the defendant to be discharged upon that account. The objection appears to be, that as to a small portion of what was sold (the timber on the whole estate being expressly included in the purchase), title cannot be made out.

The general rule on the subject is, that although the vendor cannot make good title to a small portion of the estate, if compensation can be made for the deficiency, in consequence of such portion not being material to the possession and enjoyment of the estate, specific performance will be decreed: *M'Queen v. Farquhar* (a). The order from the Registrar's book is stated by Sir E. Sugden in his work on *Vendors*, 11th ed., p. 357. The authorities are referred to by Sir E. Sugden. In *Piers v. Lambert* (b) A contracted to sell a wharf on the banks of the river Thames, with a jetty. The jetty turned out to be liable to be removed by the Corporation of London, if they thought fit. The Master found that good title could not be made to the jetty, and "that the said jetty was essential to the beneficial occupation and enjoyment of the premises contracted to

(a) 11 Ves. 467.  
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(b) 7 Beav. 546.  
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be sold as aforesaid." Lord Langdale held that the jetty was essential to the beneficial occupation and enjoyment of the premises contracted to be sold, and that a specific performance could not be decreed.

The entire acreage of the lands is, as I have already stated, 1137A. 3R. 27P. The acreage in the hands of the two tenants who have a right to the timber on those holdings is but little more than twenty-four acres. It has not been alleged that the timber on the twenty-four acres is to be considered as ornamental timber, nor is it alleged that the right to the said timber on said twenty-four acres is material to the possession and enjoyment of the estate sold.

The case of *Magennis v. Fallon* (a) appears to bear upon this question. In that case the purchaser contracted for the purchase of a demesne with ornamental timber. Some of the ornamental timber was cut down after the contract, and Sir A. Hart is reported to have said:—"I shall not go into the question of the *quantum* of despoliation of ornament. The destruction of one beautiful tree would be sufficient, and the question is, is it such an accident and appendage as admits of pecuniary compensation? Clarke swears he did not buy this estate for income to be derived by farming the land, but for a residence. By reference to the map it appears an attractive place of residence. For that purpose it might have a value beyond the real value. But that adventitious value is taken away, and there is no instance of a Court of Equity, under such circumstances as those, compelling a purchaser, contracting for the purchase of a house and demesne fit for residence, and embellished with ornamental timber, where ornamental timber has been cut down between the contract and possession given or title shown, to complete the purchase." Sir A. Hart then adds:—"I say ornamental trees, for ordinary timber cut down would be matter of compensation; ornamental timber is essentially different."

If ordinary timber, cut down after the contract, and before the title is made out, is the subject of compensation, I think, on the same principle, the failure to make out title to ordinary timber (not ornamental), on a very small portion of the lands sold, may be con-

(a) 2 Mol. 590.

sidered as governed by the same principles on which the cases of *M'Queen v. Farquhar*, *Piers v. Lambert*, and other cases referred to by Sir E. Sugden, were decided—namely, whether the timber, as to which title in this case cannot be made out, is essential to the beneficial enjoyment of the premises contracted to be sold. So far as I can form an opinion on the facts before me, I do not think that the right to the timber on the twenty-four acres is essential to the beneficial enjoyment of the Tyrcallen estate. However, it appears from *Sir E. Sugden's Work*, p. 357, and from the case in 7 *Beav.*, that the course to be adopted is to refer it to the Master to inquire “whether the part to which a title cannot be made is material to the possession and enjoyment of the rest of the estate.” If the Master finds against the defendant, who appears to be determined, if possible, to get out of his contract, I shall in such case overrule the fifth and sixth exceptions.

The order, on the whole, which I consider will be the proper order to make, will be, to overrule the first, second, third and fourth exceptions, with costs, and let the fifth and sixth exceptions stand over, and refer it to the Master to inquire and report whether the right and title to the timber on the premises, No. 21 and No. 2, in the rental and particulars of sale, and in the fifth and sixth exceptions mentioned, are material to the possession and enjoyment of the Tyrcallen estate, contracted to be sold by the plaintiffs to the defendant; and if the Master shall be of opinion that the right and title to the timber on the said premises, No. 21 and No. 2, is not material to the possession and enjoyment of the Tyrcallen estate, let the Master inquire and report what the amount of compensation is to which the defendant is entitled, in consequence of the failure of the plaintiffs to make out title to the said timber; and reserve further order.

I omitted to observe that a letter was produced during the argument, dated the 14th of January 1851, and signed “Henry Stewart,” the tenant of No. 21 in the rental, offering and undertaking to execute such deed as would be necessary to vest the timber standing on No. 21 in the purchaser. But that offer does not vary the question, as if title is to be made by a conveyance from Mr. Henry Stewart

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of the timber on No. 21, it would be necessary to have searches as against him to ascertain whether the conveyance to him in fee-farm has been made the subject of settlement, or has been in any manner incumbered. The objection as to the timber on No. 2 is not affected by such letter.

Overrule the first, second, third and fourth exceptions, with costs, and let the fifth and sixth exceptions stand over. And refer it to the Master in this cause to inquire and report whether the right and title to the timber on the premises No. 21 in the rental and particulars of sale, and in the fifth exception mentioned, are material to the possession and enjoyment of the said Tyrcallen estate contracted to be sold by the plaintiffs to the defendant; and also whether the right and title to the timber on the premises No. 2 in the rental and particulars of sale are material to the possession and enjoyment of the said Tyrcallen estate. And if the Master shall be of opinion that the right and title to the timber on the said premises, No. 21 and No. 2, are not material to the possession and enjoyment of the said Tyrcallen estate, let the Master inquire and report what the amount of compensation is to which the defendant is entitled in consequence of the failure of the plaintiffs to make out title to the said timber.

And let the Master distinguish the amount of compensation in respect to each holding; and reserve further order until the return of said Master's report.

*Rolls Hearing Book, 22, fol. 48.*

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## In the Matter of the Renewable Leasehold Conversion Act.

PIERCE MAHONY, . . . . . *Petitioner;*  
 JOSEPH PRATT TYNTE and EDWARD  
 HENRY CASEY, . . . . . *Respondents.*

June 27.  
*July 23.*

THIS was a petition for a fee-farm grant under the Renewable Leasehold Conversion Act.

By a lease of the 19th of November 1700, Sir R. Bulkeley demised the lands of Marquistown to Edward Fisher, yielding and paying a yearly rent, "and also the rent of £5 sterling yearly for every acre of meadow on the premises that shall be ploughed, dug or rooted up without the consent of Sir R. Bulkeley, his heirs and assigns, and so for a lesser quantity, except for the planting of trees; and also the sum of £5 sterling for every acre of the premises hereby demised which shall be set or let to any person who shall hold any part of the lands of Mullagheagh, Creehelp, Donard or Whitestown, adjacent to the same; also the sum of forty shillings sterling yearly for every tenant or undertenant inhabiting on the premises (after the first five years of the demise) that shall be a Papist, or so reputed."

The lease contained clauses of distress and re-entry, and covenants to pay the rent, forfeitures and penalties, and to fence one-half of the meres between Marquistown and Mullagheagh, &c., under a penalty of one shilling a-perch yearly, and a covenant for

Papist, or so reputed, and covenants to fence the lands and to pay the rents and penalties. *Held*, on a petition under the 12 & 13 Vic. c. 105 (Renewable Leasehold Conversion Act)—first, that the lessee was entitled to have the reservation as to the meadow commuted under section 3 of the Act, and that meadow meant meadow at the date of the last renewal.

Secondly, that the reservation for letting to persons holding the adjacent lands, could not be omitted from the fee-farm grant, or commuted, as it was not a covenant interfering with the proper cultivation of the land within the 3rd section.

Thirdly, that the reservation for every Papist tenant was not illegal, was a subsisting clause within the 1st section, and did not interfere with the proper cultivation of the land, and therefore could neither be omitted or commuted.

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renewal, which is stated in the judgment. On the 6th of November 1787, the parties entitled to Fisher's interest demised the lands for three lives, with covenant for perpetual renewal. The clauses and covenants in the latter lease were substantially the same as those in the lease of 1700.

The petition was presented by Mahony, who was entitled to the lessee's interest in the lease of 1787, against Tynte, the reversioner in fee, and Casey, entitled to the interest in the lease of 1700. The petitioner's right to the fee-farm grant was admitted, the only question in dispute being, whether the above clauses and covenants should be omitted from the grant or commuted?—The leases and the title of the parties are fully stated in the judgment.

*Argument.*

Mr. Sergeant *Christian* and Mr. *Thomas Galway*, for the petitioner, argued that the penal clause with respect to ploughing up the meadow should be omitted without any compensation, being useless to the landlord, or else should be construed strictly, and applied only to meadow subsisting at the time of the original lease of 1700, or at all events of the last renewal of 1827, and the compensation should be calculated on that principle, as it was clearly a clause which ought to be commuted as interfering with the due cultivation of the land: *Birch v. Stephenson* (*a*); 1 *Furl. Land. & Ten.*, p. 666. That the clause as to the preservation of boundaries was not a subsisting clause within the 1st section, as it had been altogether disregarded since the commencement of the lease, and was no longer necessary, as the ordnance survey had accurately defined the boundaries of the lands; or it was a clause interfering with the proper cultivation of the land within the 3rd section of the Act. That the clause imposing a penalty of forty shillings for every tenant who should be a Papist, or so reputed, was no longer a subsisting clause, never having been enforced, and having been manifestly framed for a state of law and society which did not now exist, Roman Catholics being now as capable of acquiring or holding property as other persons, and should be altogether omitted: *Stewart v. The Marquis of Conyngham* (*b*). It also interfered

(*a*) 3 *Taunt.* 469.(*b*) *Supra*, p. 534.

with the proper cultivation of the lands, which were in the county of Wicklow, where the majority of the population were Roman Catholics, and it might be difficult to procure Protestant tenants.

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Argument.

Mr. J. E. Walsh, for the respondent Tynte, admitted that the first clause was within the 3rd section of the Act, as interfering with the cultivation of the land; but it was a "subsisting covenant," which must mean a covenant capable of being enforced. The word "meadow" did not mean ancient meadow, as in *Birch v. Stephenson*, where the demise was of meadow ground, but meadow at any time, as in *Lord Grey De Wilton v. Saxon* (*a*), and was not unreasonable; for an action in the nature of waste would not lie: *Empson v. Soden* (*b*). The clause with respect to boundaries was still necessary, as the ordnance survey was not evidence of private rights. With respect to the last clause, he contended that although, when the lease was made, a Roman Catholic could not hold freehold lands, there was no illegality in having Roman Catholic tenants: *7 W. 3, c. 5 (Ir.)*; *9 W. 3, c. 1*; *2 Anne, c. 6 (Ir.)*. In that respect no alteration had taken place in the law, and if there had, that alteration could not alter the covenant between the parties. The circumstance that the landlord derived no benefit from the covenants was immaterial; there was no element by which any compensation could be calculated, and the rent must be increased by the sum stipulated in the lease: *Farrant v. Olmius* (*c*). The non-enforcement of the covenant was not a waiver of it: *Platt on Covenant*, p. 587; *Denton v. Richmond* (*d*); *Daly v. Bloomfield* (*e*); *Crosbie v. Sugrue* (*f*); *Paget v. Foley* (*g*); *Sanders v. Coward* (*h*).

Mr. B. Lloyd, for the respondent Casey.

The MASTER OF THE ROLLS.

In this case a petition has been presented under the Renewable

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(*a*) 6 Ves. 106.

(*b*) 4 B. & Ad. 655.

(*c*) 3 B. & Al. 692.

(*d*) 1 Cr. & Mee. 734; S. C. 3 Tyr. 630.

(*e*) 5 Ir. Law Rep. 76.

(*f*) 9 Ir. Law Rep. 17.

(*g*) 2 Bing. N. C. 679; S. C. 3 Sc. 120.

(*h*) 13 M. & W. 65.

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Leasehold Conversion Act by the petitioner (in whom the lessee's interest in a lease for lives renewable for ever, bearing date the 6th day of November 1787, is vested) to obtain a fee-farm grant under the provisions of the said Act, and a declaration from the Court that certain covenants and reservations in said indenture should be omitted altogether from the fee-farm grant, or in case such covenants and reservations should not be omitted, that they should be commuted.

The facts of the case are these:—Sir Richard Bulkeley, since deceased, being seised in fee of the lands of Marquistown, in the county of Wicklow, by indenture, bearing date the 19th of November 1700, and made between the said Sir R. Bulkeley of the one part, and Edward Fisher of the other part, demised the said lands to the said Edward Fisher for three lives therein named, yielding and paying the rent therein stated, “and also the rent of £5 sterling yearly for every acre of meadow on the premises that shall be ploughed, dug or rooted up without the consent of Sir R. Bulkeley, his heirs and assigns, and so for a lesser quantity, except for the planting of trees; and also the sum of £5 sterling for every acre of the premises hereby demised which shall be set or let to any person who shall hold any part of the lands of Mullagheagh, Creehelp, Donard or Whitestown, adjacent to the same” (that is, adjacent to the demised premises); “also the sum of forty shillings sterling [yearly] for every tenant or undertenant inhabiting on the premises [after the first five years of the demise] that shall be a Papist, or so reputed.” The words in brackets do not occur in the sub-lease of 1787.

The lease then provides, that in case the said rents, &c., forfeitures and penalties, shall not be paid at such times as the same and every part thereof shall become due and payable, it should be lawful for Sir R. Bulkeley, his heirs and assigns, to enter and distrain.

The lease also contains a clause of re-entry, and a covenant to pay the rent, forfeitures and penalties; and a covenant to fence one-half of the meres that lie between the said lands of Marquistown and the lands of Mullagheagh and Creehelp, and Marquistown and

Whitestown, by a ditch of five feet deep and six feet wide, and plant the same with three rows of quicksets of whitethorn, &c., and should complete the same within two years from the date of said lease, or otherwise forfeit one shilling a-perch yearly.

A covenant for renewal then follows, which is in the following terms:—"That if at any time hereafter, upon the expiration of *one of the three lives*, during which the premises shall be demised, the said Edward Fisher, his heirs, executors, administrators or assigns, shall, within three months from the expiration of such life, and before a second of the said lives, within the said three months, shall expire, pay down, or cause to be paid, to the said Sir R. Bulkeley, his heirs and assigns, or his or their known and authorised receiver, at the church-door of Dunlavin, the sum of £45 sterling, at one entire payment, within the expiration of the said three months, and before the expiration of a second life, he the said Sir R. Bulkeley, his heirs and assigns, shall and will insert another life, instead of the said life then expired, of such person as the lessee for the time being shall nominate and appoint, provided such person be not of the family or kindred of the lessor; and that upon every such renewal this indenture, and every clause therein, shall be again renewed, and perfected on each part, *mutatis mutandis*."

All the estate and interest of the said Sir R. Bulkeley in the said lands and premises, and the reversion expectant on the said demise of the 19th of November 1700, and the several renewals thereof, are now vested in Joseph Pratt Tynte, one of the respondents, and all the estate and interest of the lessee in the said lease of the 19th of November 1700, and the several renewals thereof, and the right to a renewal under the covenant for renewal therein contained, became, previous to the indenture of 1787 hereinafter mentioned, vested in John Hunt and Benjamin Hunt, and are now vested in the respondent Edmond Henry Casey.

John Hunt and Benjamin Hunt being entitled to the lessee's interest in the lease of 1700, by indenture, bearing date the 6th of November 1787, and made between the said John Hunt and Benjamin Hunt of the first part, Arthur Preston and Anne his wife of the second part, and Edward Fisher of the third part (which Edward

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Fisher was a different person from the Edward Fisher the lessee in the lease of 1700), the said John Hunt and Benjamin Hunt, with the consent and approbation of the said Arthur Preston and Anne his wife, demised to the said Edward Fisher the said town and lands of Marquistown, to hold for the three lives therein mentioned. The said lease of the 6th of November 1787 contains a covenant for perpetual renewal, but in a different form from the covenant in the lease of 1700, and also contains covenants to the same effect as the other covenants in the lease of 1700. All the estate and interest under the said indenture of the 6th of November 1787, and the right of renewal thereunder, is now vested in the petitioner; and the estate and interest of John Hunt, Benjamin Hunt, Arthur Preston, and Anne his wife, in the reversion expectant on said demise, are now vested, as already stated, in the respondent, Edmond Henry Casey.

The respondent Joseph Pratt Tynte and Edmond Henry Casey do not deny the petitioner's right to require a fee-farm grant under the provisions of the Renewable Leasehold Conversion Act, but differ as to the form of the grant. It is therefore not necessary for me to offer any opinion as to the question whether the covenant to renew in the lease of 1700 is a covenant for perpetual renewal.

The covenant in the lease of 1787 is a covenant for perpetual renewal; but unless the head lease of 1700 contains such a covenant, the petitioner would not of course be entitled to sustain his petition.

The authorities on the subject are *Tritton v. Foote* (*a*); *Moore v. Foley* (*b*); *Kenny v. Forde* (*c*), and other cases referred to in the case of *Kenny v. Ford*.

The right to a fee-farm grant being admitted by the respondents, the petitioner insists that he is entitled to have the reservation of £5 sterling, late currency, yearly for every acre of meadow on the premises that shall be ploughed, dug or rooted up without the consent, in writing, of John Hunt and Benjamin Hunt, and their heirs, commuted, as being a reservation interfering with the proper

(*a*) 2 Brow. C. C. 636.

(*b*) 6 Ves. 235.

(*c*) Batty, 534.

cultivation of the land ; and the petitioner insists that the word " meadow " occurring in the reservation means what was ancient meadow at the date of the lease of 1700, or, at all events, at the date of the last renewal of the said lease, dated on the 13th of November 1827. The respondents insist that the lessor in the lease of 1700, his heirs and assigns, were entitled to claim said reserved rent of £5 for every acre of meadow ploughed up at any time, without regard to the length of time during which said lands were previously laid down in meadow.

This covenant is admitted to be a covenant which interferes with the proper cultivation of land within the meaning of the 3rd section of the Act, and I am of opinion that the term " meadow " is to be taken to mean what was meadow at the date of the last renewal of the lease of 1700, which renewal bears date on the 13th of November 1827, and contains, as I understand, covenants and reservations in the same terms as in the lease of 1700. I have not, however, seen the renewal of 1827, and my opinion is founded on the assumption that the covenants and reservations in such renewal are in the same form as in the original lease.

The petitioner, secondly, insists that he is entitled to have the reservation of £5, late currency, for every acre of the premises which shall be set or let to any person who shall hold any part of the lands of Mullagheagh, Creehelp, Donard, or Whitestown, adjacent to the demised premises, omitted from said grant as being no longer a subsisting reservation ; or that if it be a subsisting reservation, it should be commuted, as being an improper restriction on cultivation, by reason of its restricting the choice of the petitioner in the selection of his tenantry.

The respondents insist that the said reservation is still subsisting, and ought not to be commuted, the same not being within the meaning of the 3rd section of the Renewable Leasehold Conversion Act. I am of opinion that the petitioner is not entitled to have that covenant either omitted or commuted. It is clear from the covenant on the part of the tenant, which I have stated, to fence one-half of the meres that lie between the demised premises of Marquistown and the lands of Mullagheagh, Creehelp and Whitestown, that the

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*Judgment.*

object of the covenant against setting or letting the lands of Marquistown to the tenants of the adjoining lands was to prevent confusion of boundaries, which constantly arises from tenants holding different denominations of land adjoining each other ; and it is clear that it should not be omitted without being commuted ; and I am of opinion that it is not a covenant interfering with the cultivation of land within the meaning of the 3rd section, and that the petitioner is therefore not entitled to have it commuted.

The petitioner, thirdly, insists that he is entitled to have the reservation of forty shillings, late currency, for every tenant or under-tenant inhabiting on the premises that shall be a Papist, or so reputed, entirely omitted from said grant, as being contrary to the present policy of the law, and no longer subsisting, or to have the same commuted, as improperly interfering with the cultivation of the land.

The respondents insist that said reservation is still subsisting, and ought not to be omitted, and that same is not within the meaning of the 3rd section of the Renewable Leasehold Conversion Act, and cannot be commuted thereunder.

The petition states that the greater proportion of the inhabitants of the county and barony where the lands are situate, and who constitute the farming class, profess the Roman Catholic religion, and that a large number of the tenants occupying the said lands, during the last century, have professed that religion.

The petition states that if the petitioner was confined, for the selection of his tenantry, to such classes alone as do not profess the said religion, the proper cultivation of the said lands would be interfered with by reason of the difficulty, if not the impossibility, of procuring a sufficient number of solvent and respectable tenants from the said classes ; and the petitioner submits that the said reservation comes within the meaning of the 3rd section of the Act, and that he is entitled to have the same commuted.

The petition further states that the lands comprise one thousand one hundred acres, and that although the greater proportion of the tenants on the said lands have been persons professing the Roman Catholic religion, the payment of the penalty of forty shillings has never been paid, demanded or enforced.

With respect to the non-payment of the penal rent, and the acceptance of the single rent, this does not affect the question : *Denton v. Richmond* (*a*). It has, however, been argued that the covenant should be omitted as being contrary to the policy of the law.

I cannot see any thing illegal in a covenant in a lease not to let to a particular class. A covenant not to let to a Protestant would at the present day be perfectly legal, and there can be no difference between a covenant against letting to one class of persons and to another.

The authorities on this subject were not referred to, but appear to be very clear on the question.

In case of a condition annexed to an estate in fee, it is laid down in *Littleton*, s. 360:—"If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void." But in section 361 he adds:—"But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to any of his heirs, or of the issues of such a one, &c., or the like, which conditions do not take away *all* power of alienation from the feoffee, &c., then such condition is good." Lord Coke observes on this section:—"If a feoffment in fee be made on condition that the feoffee shall not enfeoff I. S., or any of his heirs, or issues, &c., this is good, for it doth not restrain the feoffee of *all* his power. The reason here yielded by our author is worthy of observation;" *Co. Lit.* p. 223, *a*. So also in *Doe v. Pearson* (*b*), a condition not to alien except to particular persons was held good.

Lord Coke, *Co. Lit.* p. 223, *a*, observes, that the rule, that if a feoffment is made upon condition not to alien the land, the condition is void, is applicable to a devise, grant, release, confirmation, or any other conveyance whereby a fee-simple doth pass.

The same rule applies where the grantor, who has a less estate or interest than a fee, gives or sells his whole interest.

In *Co. Lit.* p. 223, *a*, after the passage above referred to, it is added:—"And so it is if a man be possessed of a lease for years, &c., and give or sells his whole interest, or property therein, upon condition that the donee or vendee shall not alien the same, the

(*a*) 3 Tyrw. 630.

(*b*) 6 East, 180.

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condition is void, because his whole estate or interest is out of him so as he hath no possibility of reverter."

Lord Coke further states that "a man, before the Statute of *Quia Emptores*, might have made a feoffment in fee," and added further, "that if he or his heirs did alien without license, that he should pay a fine, then this had been good; and so it is said that then the lord might have restrained the alienation of his tenant by condition, because the lord had a possibility of reverter; and so it is in the King's case at this day, because he may reserve a tenure to himself."

It is clear that in the case of a lease the lessor, because he has a reversion, may introduce covenants restricting the right of the lessee to alien. Thus in *Doe v. Carter* (a) a covenant not to let, set, assign, transfer, make over, barter, exchange or otherwise part with the indenture, &c., without the license, in writing, of the lessor, was held valid.

Lord Kenyon states:—"Generally speaking, the grant of an estate carries with it all legal incidents, and therefore the grantee has a right to sell and convey, unless he be controlled by the terms of his grant. In the case of *Lord Stanhope v. Sheggs*, Lord Mansfield seems to have doubted on this ground whether or not the covenant, that the executors of the tenant should not assign, were void, as being inconsistent with the thing granted; but in so doing his Lordship probably overlooked the maxim that *modus et conventionis vincunt legem*, though, indeed, that maxim is to be taken with some qualifications; for a grantor, when he conveys an estate in fee, cannot annex a condition to his grant not to alien; nor when he conveys an estate tail, a condition not to bar the entail. Such restrictions are imposed to prevent perpetuities; but short of that restriction, both parties to a contract may model it in what manner they please."

In the case of *Wilkinson v. Wilkinson* (b), Sir T. Plumer states: "Cases respecting restraints on alienation have frequently arisen, and some are of considerable antiquity. They are to be found in *Dyer*, in *Anderson* and in *Leonard*. The modern books are full

(a) 8 T. R. 60.

(b) 3 Swanst. 523.

of them ; and although the Courts look with a jealous eye on such restraints, yet it is now clear that he who gives may annex such conditions to the gift." Several other cases are collected in *Platt on Covenants*, c. 12.

I am of opinion, on those authorities, that the covenant is not contrary to law.

The question which then arises is, whether the covenant in question interferes with the proper cultivation of the land within the meaning of the 3rd section of the statute ?

I am of opinion that it does not fall within the section.

I cannot understand in what manner, or by what calculation, the Master could determine the amount of additional rent to be paid for the omission of such a covenant. It would be necessary to inquire the number of Protestants and Roman Catholics resident in the barony in which the lands lie.

Suppose a covenant not to let to a Protestant, where lands are situate in a county in the South or West of Ireland, would that interfere with the cultivation of land? Suppose a covenant, such as is contained in the lease of 1700, was contained in a lease of lands in England or Scotland, or in the North of Ireland, could it be said to interfere with the proper cultivation of land? If not, it would be necessary that I should refer it to the Master to inquire and report how many Protestants and how many Roman Catholics reside in the barony in which the lands lie, in order to come to a conclusion whether the insertion of the covenant would interfere with the cultivation of the land.

I do not think the Legislature had any such covenants in contemplation when the Act was passed. The argument on the part of the petitioner is, that *any* covenant which confines the lessee in the selection of his tenantry, interferes with the proper cultivation of the land within the meaning of the statute.

If the argument is well founded, every covenant, restrictive of an assignment or sub-lease, without the license of the lessor, would fall within the 3rd section.

I am of opinion, on the whole, that a covenant not to let or set to a particular person, or a particular class of persons, is not a covenant

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1851.  
*Rolls.*

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TYNTE.  
*Judgment.*

which interferes with the cultivation of land within the meaning of the statute.

I shall make an order containing a declaration as to my opinion on the questions raised, which will probably render any proceedings before the Master unnecessary.

The Court doth declare that the petitioner is not entitled to have the reservation of £5, late Irish currency, in the petition mentioned, for every acre of the demised premises which shall be set or let to any person who shall hold any part of the lands of Mullagheagh, &c., either omitted from the fee-farm grants or commuted: And the Court doth further declare that the petitioner is not entitled to have the reservation of forty shillings, late currency, for every tenant or undertenant inhabiting on the premises that shall be a Papist, or so reputed, omitted from the fee-farm grants or commuted, the said reservation not falling within the provisions of the 3rd section of the Renewable Leasehold Conversion Act: And the Court doth further declare that the petitioner is entitled to have the reservation of £5, late Irish currency, for every acre of meadow on the premises that shall be ploughed, dug or rooted up, without the consent, in writing, of John Hunt and Benjamin Hunt, and their heirs, commuted under the provisions of the 3rd section of the said Act: And the Court doth declare that the word "meadow" is to be taken to mean what was meadow at the date of the last renewal of the head lease, and which renewal bears date the 15th day of November 1827; and it is referred to the Master (having regard to such declarations) to certify the amount of the respective fee-farm rents, to be made payable upon the grants in fee-farm, to be made of the lands and premises comprised in the leases in the petition mentioned; and whether any life or lives in the last renewals of the said leases of the 19th day of November 1700, and the 6th day of November 1787, have respectively dropped, and whether any fine or fines, or

interest thereon, or fees, are properly payable before the execution of the fee-farm grants, and by and to whom, and whether any and what arrear of the rent reserved by said leases, and the renewals thereof, is due, and by and to whom; and let the Master settle and approve of the drafts of the said fee-farm grants, and to whom such grants should be made: And it is further ordered that the Master do state all such other matters as may seem to him expedient for carrying into due execution the provisions of the said Act: And the Court doth declare that the petitioner do pay to the respondents their costs of appearing on the said petition; and reserve further order and the question of the further costs until the Master shall have made his report.

1851.  
*Rolls.*  
MAHONY  
*v.*  
TYNTE.  
*Judgment.*

*Rolls Petition Hearing Book, 39, fol. 162.*

1851.

Chancery.

## BLOUNT

v.

THE GREAT SOUTHERN AND WESTERN RAILWAY  
COMPANY.

(Chancery.)

Nov. 6.

An order for re-hearing of a cause petition will be granted on a motion of course, founded upon the certificate of Counsel that the case is a proper one for re-hearing.

Mr. H. BARRY, on behalf of the respondents, applied by motion of course that this cause petition should be set down for re-hearing. The motion was founded upon the certificate of Counsel, stating that the case was a proper one for re-hearing.

The LORD CHANCELLOR made the following order:—

Upon the respondents depositing with the Registrar the sum of £10 within four days from the date of this order, let the respondents be at liberty to set down this matter for re-hearing touching the order bearing date the 2nd day of August 1851; serving on the petitioners notice of this order, and specifying in such notice those parts of the order of the 2nd of August 1851, complained of by the respondents.

1851.  
Chancery.DUFFY *v.* JOHNSON.*Nov. 6.*

THIS was a cause petition, praying that the respondent might be compelled specifically to perform an agreement to accept a lease of certain premises.

Mr. *Greene*, for the petitioner, proposed to read as evidence of *the contract* a letter mentioned in an affidavit made by the petitioner in reply to the affidavit of the respondent.

Mr. Serjeant *Christian* and Mr. *Francis Fitzgerald*, for the respondent, objected to the admission of the letter as evidence of the contract, inasmuch as the letter had not been put in issue by the petition.

## The LORD CHANCELLOR.

It is impossible to admit, as evidence of *the contract*, a letter not put in issue either by the original petition, or by an amendment of it, or by a supplemental petition.

At a subsequent period of the hearing of this case the same letter was, without objection, read as evidence of facts put in issue by the petition.

1851.

Chancery.CARTER *v.* CARTER.

Nov. 8.

The Court will make a summary order under the 15th section of the Court of Chancery Regulation Act upon a cause petition, filed by an incumbrancer and annuitant, praying—not redemption, foreclosure, or sale—but the appointment of a receiver over lands, subject to his (the petitioner's) incumbrance and annuity, although a petition for the sale of the same lands has been previously presented in the Incumbered Estates Court by the owner of the lands.

Statement.

THIS cause petition, filed under the Court of Chancery Regulation Act, stated that the petitioner was entitled to a charge of £5000, Irish currency, upon certain lands in the county of Meath, whereof the respondent was seized in fee, and also to an annuity of £400, charged upon the same, and certain other lands in that county, and to a judgment recovered in Trinity Term 1833, by the petitioner against the respondent in the Court of Exchequer for £6769. 2s. 7d.; that the respondent was in possession or in receipt of the rents and profits of the Meath estates, and also of certain other lands, situate in the counties of Kildare, Roscommon, Dublin, and the Queen's County, of which, at the time of the rendition of the judgment, he was seized in fee; and that on the 26th of May 1851, he had presented a petition in the Incumbered Estates Court for the sale of all the foregoing lands (except those in Kildare) for the discharge (*inter alia*) of the incumbrances vested in the petitioner here; and that no order for sale of the lands had as yet been pronounced by the Commissioners. The present petition also stated that the principal and a sum of £461. 10s. 9d. for interest on the charge of £5000, a sum of £600 arrears of the annuity, and a principal sum of £3384. 12s. 3d., together with £338. 9s. 3d. for interest on the judgment, were respectively due to the petitioner. That there was not to his knowledge any decree or order for the appointment of a receiver over the lands, nor any proceeding pending for the purpose of obtaining one. The petition concluded by praying that a receiver might be appointed over the lands and premises, and that out of the rents to be received by him the sums due and to accrue due to the petitioner should, together with his costs, be paid, and that an account of the sums due to the petitioner on foot of his securities should be taken (if necessary), and that all proper accounts might be directed, and directions given, &c.

Mr. *T. Rice Henn* moved for a summary order under the 15th section of the Court of Chancery Regulation Act according to the prayer of the petition, and cited *Corban v. Lord Mountcashell* (*a*). He observed that the petition, not praying redemption, sale, or foreclosure, did not fall within the prohibition contained in the 42nd section of the Incumbered Estates Act (12 & 13 Vic. c. 77), nor within the authority of *Murphy v. Sealy* (*b*).

1851.  
Chancery.  
CARTER  
v.  
CARTER.  
Argument.

The LORD CHANCELLOR, after some consideration as to whether the case was within the summary jurisdiction of the Court under the 15th section of the Court of Chancery Regulation Act, acceded to the prayer of the petition, and made the usual summary order of reference.

*Judgment.*

(*a*) *Supra*, p. 234.

(*b*) *Supra*, p. 228.

#### FRENCH v. CRAIG.

*Nov. 8.*

THIS was a cause petition, presented by the petitioner as administratrix with the will annexed of her late husband John French, and prayed that the trusts of the will might be carried into execution, and sought the ordinary administration accounts.

Where a petition is presented by the personal representatives of a deceased person, praying that the trusts of his will may be carried into execution, and the accounts of his real and personal estate may be taken under the direction of the Court, a summary order, under the 15th

Mr. *Dix* moved the petition, and stated that it would have come under the 15th section of the Court of Chancery Regulation Act if it had not been for the 8th General Order of the 31st of July 1851, which required that in every cause petition presented for the administration of assets it should be stated "that a personal demand of such payment or account as shall be sought by the petitioner has

section of the Court of Chancery Regulation Act, may be made on the petition, although it does not state that a personal demand of the account sought has been made three weeks before presenting the petition as required by the 8th General Order of July 1851, that order being applicable only to cases where such an account could be demanded.

1851.

Chancery.FRENCHv.CRAIG.Argument.

been made to the respondent at least three weeks before presenting the petition, with the reply, if any, to such demand, and the petitioner shall not be entitled to a summary order under the said section (the 15th) on any petition which shall not contain such statement;" and as the petitioner here could not ask an account from herself, it became necessary to present the petition as an ordinary case, and notice of it had been served on the residuary legatees, one of whom had appeared.

Judgment.

The LORD CHANCELLOR said the plain meaning of the 8th General Order was, that it was only to apply to cases where an account could be demanded, and that, notwithstanding that order, he thought this was a case in which he could make a summary order.

BENNETT *v.* BRISCOE.

Nov. 27.

A party entitled to the interest, during his life, of a sum of money charged upon lands, may, under the 15th and 27th sections of the Court of Chancery Regulation Act, obtain on petition, praying merely a receiver over the lands, a summary order of reference to the Master for that purpose.

THIS was a cause petition, set down for hearing under the 15th section of the Court of Chancery Regulation Act, praying that a receiver might be appointed over certain estates, in the petition mentioned, for the purpose of paying to the petitioner, out of the rents and profits, the interest on a sum of £1500, charged upon the lands by deed of settlement. The petitioner, having merely a life interest in this fund, was entitled to the annual interest only.

Mr. R. W. Osborne moved the prayer of the petition.

Mr. Harris, for the respondent.

This case does not fall within the 15th section, nor is it a case for special relief within the 27th section, the granting of a receiver being merely ancillary relief.

Mr. Osborne, in reply.

The petitioner is only entitled to interest on the sum of £1500 during his life. The Court has jurisdiction under the 27th section; if a bill were filed, by the trustees of the settlement, to raise the amount of the charge, a part of the relief would be the granting of a receiver, whose duty it would be to pay the interest to the tenant for life.

1851.  
*Chancery.*  
 BENNETT  
 v.  
 BRISCOE.  
 —  
*Argument.*

The LORD CHANCELLOR.

I shall make a reference to the Master in this case, although I must say that I have considerable difficulty in so doing. I have made orders for the appointment of receivers in cases where proceedings for sale of the property were pending in the Incumbered Estates Court, and it was necessary that a receiver should be appointed until a sale was accomplished there. It does, however, appear to me that the language of this section is quite wide enough to include the case before me.

*Judgment.*



PUXLEY v. HUTCHINS.

*Dec. 4.*

THE petition stated a charge, absolutely vested in the petitioner, on lands of the respondent, an arrear of interest due, an application to the respondent for payment of the charge, and his reply, to the effect that he was unable to pay, but would not oppose proceedings to raise the arrear. The prayer was for the extension of a receiver, appointed over the lands in an annuity cause, and an account, and payment of the arrears and accruing interest.

Where a party absolutely entitled to a charge upon lands, in respect of which an arrear of interest was due, presented a cause petition, praying the extension of a receiver, appointed in an annuity cause, to the petition; Held, that

Mr. Warren argued that the case was within the 27th section,

under the 15th and 27th sections of the Court of Chancery Regulation Act the usual summary order of reference might be made upon the petition.

1851.

Chancery.

PUXLEY

v.

HUTCHINS.

Argument.

enacting, that when any person was "desirous of obtaining any portion of the relief usually granted," it should "be lawful for the Court, if it so think fit, to grant the limited relief;" that the Court ought to exercise its discretion in favour of the application, the prayer being for the extension, and not the appointment, of a receiver.—[The LORD CHANCELLOR. There is some objection to a perpetual receiver. How can the respondent get rid of him?]—The respondent may present a petition for sale in the Incumbered Estates Court, or, as soon as all arrears of interest shall be satisfied, he will be entitled, in analogy to annuity causes, to apply for the discharge of the receiver.

Judgment.

The LORD CHANCELLOR, observing that the case should be disposed of without reference to the temporary provisions of the Incumbered Estates Act, made the common order of reference.



## HOLMES v. WALKER.

Dec. 6.

The 8th General Order of the 31st July 1851, applies only to cause petitions, presented with respect to the administration of real or personal estate, where a summary order is sought for under the 15th section of the Court of Chancery Regulation Act.

Mr. Brereton now moved for the usual summary order of reference, and said that the only peculiarity in the case was that there had not been a personal demand made upon the respondent under the 8th General Order of July 1851.

The LORD CHANCELLOR.

That order was not intended to apply, nor does it apply, to such cases as the present. It refers only to petitions presented with respect to the administration of real or personal estate. You may take the usual summary order.

1851.  
Rolls.

The Rev. ARTHUR MONEYPPENNY, THOMAS COLLIER,  
and several others,

*v.*

MARY FRANCES DE MASSY and others.

(*In the Rolls.*)

June 11.  
Nov. 7.

ON the 23rd of November 1850, the defendant M. F. De Massy moved that the bill might be dismissed for want of prosecution. The plaintiff moved a cross notice. The Court refused the cross notice, with costs, to be paid by the plaintiff to the defendant M. F. De Massy, when taxed and ascertained.

The plaintiffs having appeared by their Counsel, and undertaken to file a replication within two days, no rule was made on the original motion, the plaintiffs to pay the defendant M. F. De Massy £3 for the costs of the motion.

The costs having been taxed, the said defendant sued separate writs of *fieri facias* against the plaintiffs Moneypenny and Collier, and lodged them with the Sheriff of the county of Cavan. The writs were in the form prescribed in the Appendix to the Rules of 1843 (a). That against Moneypenny is stated at full length in the judgment. The Sheriff levied the execution, and returned that he had a sum of £23. 18s. 7d. (after paying the landlord of the premises on which the goods were sold), which he had ready to pay over to Mrs. De Massy. A portion of the costs had been paid by Collier, and before the notice of motion was served the defendant paid back to the plaintiff Moneypenny the balance between the sum levied and the moiety of the costs.

The writ of *fieri facias*, sued out under a decree or order of the Court by virtue of the 4 & 5 Vic. c. 105, s. 27, must correspond with the decree or order. Therefore where a separate *fieri facias* against one issued on a joint order for payment of costs against several, the Court set aside the writ as irregular, but without costs, and paid back the money levied, on the party undertaking not to bring an action in respect of the seizure and sale by the Sheriff.

Mr. Hamilton Smythe, for the plaintiff Moneypenny, moved that the writ of *fieri facias* against him should be set aside for irregu-

*Argument.*

(a) Smith's Rules, App. 20.

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*Argument.*

larity on two grounds :—First, that another writ had issued against the plaintiff Collier, and the amount of the costs had been levied against him. Secondly, that the order to pay the costs being joint, the *fieri facias* against one only of the plaintiffs was irregular. The right to issue a *fieri facias*, or an order of the Court, was given by the 3 & 4 Vic. c. 105, s. 27;\* but that right is only co-extensive with the right of a creditor to issue execution at Common Law. At law the execution must follow the judgment; and a separate execution on a joint judgment would be irregular: *Pennoyer v. Brace* (a); *Withers v. Harris* (b); *Harris v. Jameson* (c); *Clarke v. Clement* (d); 2 *Saund. Rep.* p. 72, last ed.; *Bacon's Abr. Execution.*

The *Solicitor-General* and Mr. *Deasy*, for the defendant.

The rule at law relied on in support of the motion is merely a technical rule, which cannot prevail in a Court of Equity. An order that several persons shall pay costs has always been considered as joint and several in this Court: *Ex parte Bishop* (e); *Archbi-*

(a) 1 *Salk.* 319; S. C. 1 *Ld. Raym.* 244.

(b) 2 *Ld. Raym.* 808.

(c) 5 *T. R.* 556.

(d) 6 *T. R.* 525.

(e) 8 *Ves.* 33.

\* 3 & 4 Vic. c. 105, s. 27.—“ And be it enacted that all decrees and orders of the Court of Chancery and of the Court of Exchequer at the equity side thereof, and all rules of any of the Superior Courts of Common Law, and all orders of the Lord Chancellor, or Master of the Rolls, or of the Court of Commissioners of Bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges or expenses shall be payable to any person, shall have the effect of judgments in the Superior Courts of Common Law; and the persons to whom any such moneys or costs, charges or expenses, shall be payable, shall be deemed judgment creditors within the meaning of this Act; and all powers thereby given to the Judges of the Superior Courts of Common Law, with respect to matters depending in the same Courts, shall and may be exercised by the Courts of Chancery and Exchequer at the equity side thereof, with respect to the matters therein depending, and by the Lord Chancellor, Master of the Rolls, and Court of Commissioners of Bankrupt respectively, in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any moneys or costs, charges or expenses are by such orders or rules respectively directed to be paid.”

*shop of Dublin v. Lord Trimleston (a).* The 3 & 4 Vic. c. 105, did not alter the law of the Court or the rights of the party entitled under a decree or order ; it merely gave an additional remedy for recovery of the amount secured by a decree or order.

A writ will not be set aside for irregularity in a Court of Law unless more has been levied under it than the party is justly liable to : 2 *Tidd*, p. 995. The form of the writ in the Appendix to the Rules of 1843 is only against one party.

**Mr. Smythe**, in reply.

The remedy given by the statute is a Common Law remedy, and must strictly follow the analogy to an execution on a judgment at law.

**The MASTER OF THE ROLLS.**

In this case a motion was made last Term, on the part of the plaintiff the Rev. Arthur Moneypenny, that the writ of *fieri facias*, which issued in this cause on the 5th of May against the goods of the said Rev. Arthur Moneypenny, at the suit of the defendant Mary Frances De Massy, for the sum of £41. 11s. 7½d. (under which writ the Sheriff of the county of Cavan had, on the 8th of May, seized and sold the goods of the said Arthur Moneypenny), should be set aside for irregularity.

*Nov. 4.  
Judgment.*

The facts of the case are as follow :—On the 23rd of November 1850, a motion was made in this cause on the part of the said Mary Frances De Massy, that the plaintiffs' bill might be dismissed, with costs, for want of prosecution, as to said defendant. A cross notice was moved by Counsel, on the part of the plaintiffs, and the Court, on the hearing of the notice and cross notice, refused the plaintiff's cross motion, with costs, to be paid by the plaintiff to the defendant Mary Frances De Massy, when taxed and ascertained ; and the plaintiffs, by their Counsel, having undertaken to file a replication within two days, and to pay Mary Frances De Massy £3 for the costs of the said motion to dismiss the said bill, no rule was made on the original motion ; and it was further ordered, in default of

(a) 18 Ir. Eq. Rep. 98.

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such replication being filed within the period aforesaid, that the plaintiffs' bill should stand dismissed, with costs, for want of prosecution, as against the said defendant Mary Frances De Massy, including the costs of the motion; and it was referred to the Taxing-Master to tax all said costs.

The costs having been accordingly taxed under the said order, a writ of *fieri facias* issued out of the Appearance and Writ office of the Court of Chancery, directed to the Sheriff of the county of Cavan, which was as follows:—"Victoria, by the grace of God, &c., we command you that of the goods and chattels of the Rev. Arthur Moneypenny, in your bailiwick, you cause to be made the sum of £41. 11s. 7½d., for certain costs which were lately before us in our High Court of Chancery, in a certain cause wherein the said Rev. Arthur Moneypenny and others are plaintiffs, and Mary Frances De Massy and others are defendants, by an order of our said Court, bearing date the 23rd day of November 1850, ordered to be paid by the said Rev. Arthur Moneypenny to the defendant Mary Frances De Massy,"—the writ omits to state that the order to pay was on all the plaintiffs—"and which costs have been taxed and allowed by Edward Tandy, Esq., one of the Taxing-Masters of our said Court, at the said sum of £41. 11s. 7½d., as appears by the certificate of the said Master, dated the 16th day of January 1851; and that, of the goods and chattels of the said Rev. Arthur Moneypenny in your bailiwick, you further cause to be made interest on the said sum of £41. 11s. 7½d., at the rate of £4. per cent. per annum, from the said 16th of January 1851, and that you have that money and interest before us in our said Court immediately after the execution hereof, to be paid to the said Mary Frances De Massy, in pursuance of said order, and that you do all such things as by the statute passed in the third and fourth years of our reign you are authorised and required to do in this behalf; and in what manner you shall have executed this our writ make appear to us in our said Court, on the 17th of May instant. In witness," &c.

The Sheriff returned that, by virtue of the said writ, he had sold all the goods and chattels of the Rev. Arthur Moneypenny, to be found within his bailiwick, and which produced the sum of

£56. 3s. 4d., out of which he paid Mr. Humphreys, landlord of the premises in which the goods were seized, £32. 9s. 9d. (one year's rent), leaving a balance of £23. 18s. 7d., which he had ready to pay over to Mrs. De Massy.

Two grounds of irregularity have been relied on—first, that another writ of *fieri facias* was sued out for the same amount against another plaintiff, Thomas Collier, under which there was a seizure.

I stated, when the motion was made, that upon the facts which appeared upon the affidavits, I considered the motion not sustainable on that ground. The objection was not pressed.

The second ground of irregularity, on which Counsel for the Rev. Arthur Moneypenny mainly relied, was, that, by the order of the 23rd of November 1850, the *plaintiffs* were ordered to pay the costs, whereas the writ of *fieri facias*, under which Mr. Moneypenny's goods were sold, was against the Rev. Arthur Moneypenny alone, and that the writ did not follow the order of the Court.

There is no doubt that at the Common Law, if there be a judgment against two or more, the execution must be joint, and not against one only. *Viner's Abr. Execution*, N. oct. ed., vol. 10, p. 547; *Clarke v. Clement* (a).

Previously, however, to the statute 3 & 4 Vic. c. 105, a joint order to pay was considered in equity to be joint and several.

In *Daniel's Chan. Prac.*, vol. 2, p. 1325, it is stated:—"It may be observed, that where there is a joint order for payment of costs by two or more persons, the order is considered joint and several, and that in such case, if one of the individuals to pay abscond, or cannot be served, a proceeding against the other will be good."

In the case of *Ex parte Bishop* (b) Lord Eldon appears to have considered that a joint order for payment of costs was to be considered in equity as joint and several.

The question therefore which arises is, whether, where a party treats an order or decree of a Court of Equity, which he has obtained, as a judgment, and issues a *fieri facias* or *elegit* thereon under the 3 & 4 Vic. c. 105, the Court is, under the provisions of the statute and the General Orders and forms issued thereunder, to

(a) 6 T. R. 525.

(b) 8 Ves. 33.

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follow the practice which is settled at law, that the execution should follow the judgment? or whether, as a Court of Equity has held, previously to the statute, that the order or decree, although in form joint, is to be considered joint and several, the Court can, when it is sought to issue execution on such decree or order under the said Act, treat it as a joint or a several judgment, as the party who issues the execution may think proper to consider it?

The statute 3 & 4 *Vic.* c. 105, s. 27, enacts, that all decrees and orders of the Court of Chancery, and all rules of any of the Superior Courts of Common Law, and all orders of the Lord Chancellor or Master of the Rolls, whereby any sum of money or any costs, &c., shall be payable to any person, shall have the effect of judgments in the Superior Courts of Common Law; and the persons to whom any such moneys or costs, &c., shall be payable, shall be deemed judgment creditors within the meaning of the Act; and it is further enacted that all powers thereby given to the Judges of the Superior Courts of Common Law, with respect to matters depending in the same Courts, should and might be exercised by the Court of Chancery, with respect to matters therein depending; and all remedies by the said Act given to judgment creditors were in like manner given to persons to whom any moneys, costs, &c., are by such orders and decrees respectively directed to be paid.

The 29th section enacts, that such new or altered writs should be sued out of the Courts of Law and Equity, as might by such Courts respectively be deemed necessary or expedient for giving effect to the provisions thereinbefore contained, and in such forms as the Judges of such Courts respectively should, from time to time, think fit to order; and that the execution of such writs should be enforced, in such and the same manner as the execution of writs of execution is now enforced, or as near thereto as the circumstances of the case will admit, and that any existing writ, the form of which should be in any manner altered, in pursuance of the Act, should nevertheless be of the same force and virtue as if no alteration had been made therein, except so far as the effect thereof might be varied by the Act.

These two sections are in substance the same as the 18th and

20th sections of the 1 & 2 *Vic.* c. 110, the corresponding enactments in force in England.

In England forms of writs of *elegit* and *fieri facias* were, under the provisions of the 20th section of the latter Act, prepared by the English Common Law Judges in the year 1839.

On reference to those forms (which will be found in 9 *Adolphus & Ellis*, p. 986) it appears that they are framed as applicable to cases where there is one plaintiff; but the General Order which precedes the forms directs that they shall be used with such alterations as the nature of the action, the description of the Court in which the action is depending, the character of the parties or the circumstance of the case may render necessary; but that any variance, not being in matter of substance, shall not affect the validity of the writs sued out.

There is no doubt, as it appears to me, that in Courts of Law the rule of practice which I have stated, that the execution should follow the judgment, is still in force, and that, where there is a judgment or order in a Court of Law against two or more, the execution must be joint, and not against one only.

In the year 1839 the Court of Chancery in England issued General Orders to carry into effect the Act of the 1 & 2 *Vic.* c. 110, and annexed forms of writs of *fieri facias* and *elegit*, which were obviously framed from the forms prepared by the Common Law Judges.

The third of those Orders directs that such writs, when sealed, shall be delivered to the Sheriff or other officer, to whom the execution of the like writs issuing out of the Superior Courts of Common Law belongs, and shall be executed by such Sheriff or other officer, as nearly as may be, in the same manner in which he doth or ought to execute such like writs; and the latter part of the order then provides that the Sheriff shall not be allowed any fees, except those allowed for the execution of the like writs, issuing out of the Superior Courts of Law.

The 6th of the said General Orders provides for the fee to be paid to the Clerk in Court for the issuing of each writ, as well as the fee to be paid to the solicitor.

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It could scarcely have been intended by the latter Order that it should be optional with the solicitor, at whose instance the writ was issued, to issue as many writs as there were parties against whom the order or decree was obtained (although they might all reside in the same county), and thereby accumulate the costs and expenses attendant on the execution.

In November 1840 Lord Plunket and Sir M. O'Loughlen issued forms taken from the forms of the Court of Chancery in England. Those forms are in the *Appendix* to Mr. W. Smith's edition of *Sir E. Sugden's Orders*.

Having felt some difficulty as to the question in this case, I obtained a certificate of the practice under the 3 & 4 Vic. from Mr. Dawson, and it appears that this is the first case in which a separate writ of *fieri facias* against one of several persons ordered to pay costs has issued.

The certificate is as follows:—"I beg leave to certify that I have caused search to be made in this office for the purpose of ascertaining whether separate writs of *fieri facias* have at any time, since the Act of 3 & 4 Vic. c. 105, issued against separate plaintiffs, upon whom there was an order to pay costs generally, and find that the one issued in this cause happens to be the first. However, in similar cases we have always been in the habit, and such has been the practice, of issuing separate attachments against plaintiffs, upon whom there was an order to pay costs, considering them jointly and severally bound; and the like practice prevailed with respect to defendants, separate attachments not unfrequently issuing against one alone where others happen to be paupers. With respect to sequestrations, the writ, being directed to sequestrators, and not to the Sheriff, goes over all counties.

"YELVERTON DAWSON."

The practice as to attachments, as certified by Mr. Dawson, appears to be in conformity to what is the practice in England, where a decree or order is sought to be enforced by process of contempt. Entertaining a doubt, however, as to the regularity of the proceeding of issuing a *fieri facias* against one of several parties against whom an order to pay money or costs was

obtained, having regard to the provisions of the statute, and the General Orders and forms directed to be adopted thereunder, Mr. Reilly has obtained for me a certificate of the course of practice in the Court of Chancery in England under the 1 & 2 Vic. c. 110, which certificate is as follows :—

"I hereby certify that if a decree or order direct the payment of costs by two or more persons, a writ of *fieri facias* would issue against them jointly under the Act of 1 & 2 Vic. c. 110, and it might be executed against any one of them, but no separate writ or writs would be issued against the parties severally."

"F. BEDWELL,

"Clerk of the Records and Writs,  
in the High Court of Chancery of England."

"18th September 1851."

I may observe that no case on the subject has been decided in England.

I am of opinion, upon the whole, that the course of practice in the Court of Chancery in England is correct ; and the Legislature having provided that decrees and orders of the Court of Chancery should have the effect of judgments in the Superior Courts of Common Law, and that the person to whom any moneys or costs should be payable should be deemed judgment creditors within the meaning of the Act, and that all powers thereby given to the Judges of the Superior Courts of Common Law, with respect to matters depending in the said Courts, should and might be exercised by the Court of Chancery with respect to matters therein depending, the forms of writs adopted by the Court of Chancery in both countries being in substance adopted from the forms prepared by the Common Law Judges in England ; and as I consider that the practice in Courts of Law is quite settled, I think it is more proper that the rule of Law, that the execution should correspond with the judgment, should be followed in Equity ; and that where an order or decree of the Court of Chancery is sought to be enforced under the statute, as a judgment, by the issuing a writ of *fieri facias* or *elegit*, if the order is against two or more, the writ should (as a general rule at least) be against all.

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Judgment.

I do not of course suggest that any alteration should take place in the practice where an attachment issues, my decision being entirely confined to a writ of execution under the statute.

Under those circumstances I think I must set aside the execution, but I shall not allow any action to be brought.

In the case of *Stanford v. Robinson* (a) an application was made to set aside an execution issued under the said Act of the 1 & 2 Vic. c. 110, and the Court, considering that the execution was irregular, set it aside; but Tindal, C. J., stated that the issuing of the execution might be considered as the act of the Court by its officer as much as the act of the party; that the rule must be made absolute, with costs, as prayed, but that the plaintiff must undertake to bring no action.

As the writ is to be set aside, I apprehend I must order the money levied thereunder to be returned. A part has been paid to Mr. Humphreys the landlord. Notice of the motion must be given to him before I make the order that he should repay that amount. I have, however, drawn up the order, but shall not have it entered until the affidavit of service of notice on Mr. Humphreys shall have been made.

The objection made to the writ is very technical, and I have yielded to it with reluctance, and I shall not give any costs to Mr. Moneypenny.

It is scarcely necessary to add that no blame whatever is to be attached to the officer in the Appearance and Writ office, who issued the writ. The question is one of some difficulty, and it was natural, where orders of Courts of Equity have been usually considered as joint and several, that the writ should have issued against Mr. Moneypenny alone.

The order will be as follows:—

The Rev. Arthur Moneypenny, by his Counsel, *Hamilton Smythe*, Esq., undertaking in open Court not to bring any action in respect of the seizure and sale by the Sheriff of the county of Cavan under the writ of *fieri facias*, which issued in this cause on the 5th day of May 1851, against

(a) 3 M. & G. 407.

the goods of the said Rev. Arthur Moneypenny, at the suit of the defendant Mary Frances De Massy, let the said writ be set aside for irregularity, the same having been issued against the said Rev. Arthur Moneypenny alone, and the order of the 23rd of November 1850, on which said writ issued having ordered the costs therein mentioned to be paid by the plaintiffs; and let Mr. Humphreys, the landlord of the premises on which the goods were seized, and to whom the said Sheriff paid over the sum of £32. 9s. 9d., for one year's rent, as appears by the return to the said writ, pay back same to the Rev. Arthur Moneypenny, or his attorney, lawfully authorised, within ten days from the date of this order; and let the defendant, Mary Frances De Massy, within said period, pay back to the said Rev. Arthur Moneypenny, or his attorney, lawfully authorised, the balance of the sum levied, namely, the sum of £23. 18s. 7d.; and let the said Rev. Arthur Moneypenny and Mary Frances De Massy abide his and her own costs of this motion; and let the said Mary Frances De Massy, when the said sums shall have been paid back, be at liberty to take such proceedings as she may be advised to enforce the performance of the said order of the 23rd of November 1850.

1851.  
*Rolls.*

MONEYPENNY  
v.  
DE MASSY.

*Judgment.*

1851.

Rolls.

ELEANOR M'KEON, by JAMES NIXON, her next friend,

v.

WALSH and others.

April 17, 24.

If the next friend of a married woman be insolvent, the Court will stay the proceedings until the next friend be changed, or she shall give security for costs.

**Mr. Maley**, for the defendants, moved that further proceedings in this cause might be stayed until the plaintiff should have changed her next friend, and appointed a solvent person in the place of James Nixon, or until the plaintiff should have given security for costs, and that the time limited for the defendants to answer, plead or demur, might be enlarged until one week after the plaintiff should have changed her next friend, or given security for costs.

*Drinan v. Mannix* (3 Dr. & War. 154), followed.

In support of the application *Drinan v. Mannix* (a) was cited.

**Mr. P. Fitzpatrick**, for the plaintiff, opposed the motion.

April 24.  
Judgment.

The MASTER OF THE ROLLS.

An application was made in this case that the proceedings should be stayed until the plaintiff, who is a married woman, shall have changed her next friend, and appointed a solvent person, or until she shall have given security for costs.

I think it appears sufficiently by the affidavits that the next friend is not solvent. It is so stated in two passages in the affidavit on which the motion is grounded, which have been left altogether unanswered.

The plaintiff's affidavit states that the next friend is in the employment of the Bank of Ireland, but it does not state that he is worth a single shilling, nor does it deny that he is unable to pay costs.

As to the practice, there appears to be a conflict of authority.

(a) 3 Dr. & War. 154.

In *Drinan v. Mannix* (a), the next friend of the plaintiff (a married woman) was insolvent, and Sir E. Sugden ordered that the proceedings in the cause should be stayed until the next friend should be changed, or that the plaintiff should give security for costs. On the other hand, Lord Langdale decided, in the case of *Dowden v. Hook* (b), that the Court does not require that the next friend of a *feme covert* plaintiff shall be a person of sufficient substance to answer the costs. The case of *Drinan v. Mannix* was cited, but Lord Langdale expressed an opinion at variance with Sir Edward Sugden's, and referred to two unreported cases, in which a *feme covert*, suing by her next friend, had been admitted to sue *in forma pauperis*. In *Wellesley v. Wellesley* (c), the plaintiff, the wife of a Peer, from whom she was living separate, was permitted to sue *in forma pauperis*; but there was the affidavit of her poverty, and that she was unable to procure any one to act as her next friend.

The question in this case came before Lord Cottenham in *Jones v. Fawcett* (d); but it was not necessary to decide it.

In this state of the authorities I think it is the duty of this Court to follow the decision of Sir Edward Sugden, notwithstanding the decision of Lord Langdale to the contrary; and therefore, as I think it sufficiently appears in this case that the next friend is insolvent, I shall make the order. I offer no opinion as to the course which the Court should adopt in a case exactly similar to *Wellesley v. Wellesley*.

Let the proceedings in this cause be stayed until the next friend of the plaintiff Eleanor J. M'Keon be changed, or she shall give security for costs, and refer it to the Master in this cause to measure the amount, and approve of such security. And let the time limited for the defendants to answer, plead or demur, be enlarged until one week after the plaintiff shall have changed her next friend, or given security as aforesaid.

*Rolls Motion Book*, 308, fol. 184.

(a) 3 Dr. & War. 154.

(b) 8 Beav. 399.

(c) 16 Sim. 1.

(d) 2 Phil. 278.

1851.  
 Rolls.  
 \_\_\_\_\_  
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 v.  
 WALSH.  
 \_\_\_\_\_  
 Judgment.

1851.

Rolls.*April 26, 28,  
29.*

A solicitor was arrested on the direct way from the Taxing-Master's office, but it appeared that before his arrest he had deviated considerably from the direct way. *Held*, that he was not entitled to be discharged.

*Statement.*

THIS was an application on behalf of the defendant, Mr. Thomas Wilson, who was a solicitor of this Court, to be discharged from custody under a writ of attachment, which had issued in this cause, for non-payment of a sum of money directed by the decree to be paid by him. It appeared from affidavits filed for the motion that Mr. Wilson resided in Gloucester-street, in Dublin, and that he was arrested on his return from the office of one of the Taxing-Masters at the Four Courts. The direct way from the Taxing-office to Gloucester-street is along the Quay, on the north side of the river Liffey, and through Sackville-street, Earl-street and Marlborough-street. Mr. Wilson was arrested in Marlborough-street, on the direct way home; but it appeared that he had deviated by crossing to the south side of the river, and proceeding through Parliament-street, Dame-street, College-green and Westmoreland-street, which was a considerable distance, had re-crossed to the north side of the river, and again joined the direct way home.

*Argument.*

*Mr. Brewster* and *Mr. Bagot*, in support of the motion, relied on *Macan v. O'Ferrall* (a); *Selby v. Hills* (b); *Pitt v. Cloomes* (c); *Cameron v. Lightfoot* (d); *Childerson v. Barrett* (e); *Strong v. Dickenson* (f); *Ex parte Clarke* (g).

The *Solicitor-General*, contra, cited *Jones v. Rose* (h).

*April 29.**Judgment.***The MASTER OF THE ROLLS.**

An application was made in this case to discharge Mr. Wilson,

(a) *Glas.* 234.(b) *1 M. & Sc.* 253.(c) *5 B. & Ad.* 1078.(d) *2 W. Bl.* 1090.(e) *11 East.* 429.(f) *1 M. & W.* 150, 488.(g) *2 Deac. & Ch.* 99.(h) *11 Jur.* 379.

who is a solicitor of this Court, from arrest. The facts on which the application was grounded were these:—Mr. Wilson resides in Gloucester-street; he was arrested in Marlborough-street on his way from the Taxing-Master's office. It appears that, on leaving the Taxing-Master's office, instead of going the shortest way home, along the Quay, and through Sackville-street, he crossed Essex-bridge, and went through Parliament-street, Dame-street, College-green and Westmoreland-street. I have read the several authorities relied on on behalf of Mr. Wilson, and in none of them has such a deviation been allowed. In one case a person stopped at a coffee-house, on the direct road home, to take some refreshment, and that was held to be no deviation. In another case the person arrested went to a tailor's shop, and in another case into an exhibition of paintings; but still on the direct way home. The latter case carried the privilege very far. The case of *Ex parte Clarke* (a), which was principally relied on, does not apply. The witness in that case had been summoned from Gravesend to London, and a different rule applied; for it appears from the authorities that if a witness is summoned to town from the country, he is not obliged to shut himself up in his lodgings while he is in town. The privilege is during the time the party is going, remaining, and returning, and while remaining in town he is privileged. Accordingly, in *Ex parte Clarke*, the witness having been summoned from Gravesend, had a continuing privilege during the time that he *bona fide* and necessarily remained in London, for the purpose of being examined.

With respect to the question of deviation, the Court would not inquire very particularly, where there are two or three routes, which is actually the shortest, provided the party was going directly home; *ex gr.*, if Mr. Wilson had gone along Capel-street, I should not have inquired whether that was the shortest possible way. But it is impossible to say in this case that Parliament-street, Dame-street, College-green, and Westmoreland-street, was the direct way home from the Courts to Gloucester-street.

Then another question arises. He was arrested in Marlborough-street, which is on the direct way to Gloucester-street from the

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(a) 2 Deac. & Ch. 99.

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Courts ; and it was contended that although his privilege was gone during the time he deviated, still that when he returned into the direct route his privilege revived. I do not find any case in which that has been decided. If that were so, a party might go to Kingstown or Drogheda, or any other part of Ireland, and still be privileged when he returned into the direct road. I shall not decide that question for the first time. The motion must be refused.

No rule.

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**DELACOUR, Petitioner ; FREEMAN, Respondent.**

**LORD DONERAILE v. FREEMAN.**

May 5, 6.

A civil-bill decree binds the defendant's goods from the delivery of the warrant to special bailiffs, not from the delivery of the decree to the Sheriff (unless it be delivered to him to be executed), or his signature of the warrant.

A petition was presented during the Hilary Vacation, praying that Robert Delacour the receiver in this matter and cause should reimburse and pay to John Clancy the sum of £34. 12s. 4d., together with his costs and expenses, including the costs of a writ served on the receiver and obtaining the opinion of Counsel thereon, and the several other expenses and losses occasioned to the said John Clancy by reason of the conduct of the receiver.

The petition stated that John Clancy obtained three civil-bill decrees against Patrick Savage at the Kanturk June Sessions 1850, and that having obtained warrants, dated the 2nd of July, to special bailiffs named by him, the bailiffs proceeded to the lands of Conagh, which were held by Patrick Savage under the respondent and defendant, and over which the receiver had been appointed.

That the said special bailiffs, in pursuance of such warrants, having proceeded to levy the sum of £34. 12s. 4d. being the amount so due on the said decrees, together with the costs, and the costs of the warrants, on or about the 10th of September 1850, made a seizure of crops growing on said lands, and being the chattels of the said Patrick

Savage, consisting of a large quantity of wheat, oats and barley, fully adequate to satisfy the amount of the petitioner's claim, and a great deal over; and that at the time the seizure was made on said crops there was no one in possession of same, save the said Patrick Savage, and having left keepers in charge thereof, they returned home without having been served with any notice by the receiver.

The petitioner then stated that, on the day appointed for the sale of the crops, he was informed by the receiver that he had taken up the lands from Patrick Savage, and that he would not permit him to sell the crops; but that any taking up of the lands was subsequent to that execution; that the petitioner brought a civil-bill for £20 against the receiver, who afterwards offered to pay that amount, which the petitioner refused to accept, and issued a writ of summons for £34. 12s. 4d., but that he discontinued the action, Counsel having advised him that it should have been brought in the name of the Sheriff, the goods being in the custody of the law.

An affidavit was made by the receiver in which he stated the facts as to his taking up the lands from Patrick Savage as follows:—

On the 6th of September Patrick Savage executed a surrender under the directions of the Master in the matter and cause. He was applied to on the 9th of September to deliver up possession; but he managed to shift the matter off until the following morning, when he gave possession, and received £56. 13s. 4d. for the price of the crops.

An affidavit was also made by the receiver's bailiff, which stated that when the farm and crops were given up to him he did not see Clancy on the lands, and that he could not have been there without the bailiff seeing him, unless he was concealed.

Mr. *Leslie*, for the petitioner, contended that the goods of a defendant were bound by the civil-bill decree from the time of the execution of the warrants to the special bailiffs. By the 2 G. 1, c. 11, s. 3, civil-bill decrees are to be executed in the same manner as executions on judgments of the Superior Courts, and a *fieri facias* binds the defendant's goods from the time of the delivery to the Sheriff.

1851.  
Rolls.  
DELAOUR  
v.  
FREEMAN.

Statement.

1851.

Rolls.

DELACOUR

v.

FREEMAN.

Argument.

**Mr. Robert Longfield**, for the receiver, argued that in order to bind the goods of a defendant in an action in the Superior Courts there must be a delivery of the writ to be executed. The decree was not delivered to the Sheriff *to be executed*. That was to be done by the special bailiffs. The time when the defendant's goods are bound was not when the decree was delivered to, or the warrant signed by, the Sheriff, but the time of the delivery of the warrant to the special bailiff. That was in this case after the surrender on the 6th of September. *Hemp v. Hooper* (a); *Kempland v. Macaulay* (b); *Pringle v. Isaac* (c); *Barker v. St. Quentin* (d); *Samuel v. Duke* (e), were cited.

May 8.  
Judgment.

## The MASTER OF THE ROLLS.

The petition prays that the Court may order the receiver, out of such monies as to the Court shall seem meet, or out of his own monies, to reimburse the sum of £34. 12s. 4d. in the petition mentioned, together with all the costs to which the petitioner has been put, &c.

The facts of the case appear to be these:—A person of the name of Patrick Savage was a tenant under the Court; and on the 6th of September last the receiver, acting under the direction of the Master, obtained a surrender by deed from Patrick Savage of the farm in his possession. The receiver paid a sum of £56 for the surrender, which sum was calculated to be the value of the growing crops.

On the 9th of September an application was made by the receiver for delivery of possession, and Patrick Savage said that possession should be delivered on the 10th of September, the following day. Possession was accordingly given, and the persons who took possession on behalf of the receiver found no person on the lands. On the same day, the 10th of September, after possession had been taken on behalf of the receiver, two persons alleging that they were special bailiffs named in a civil-bill decree seized, or attempted to seize, the growing crops. The object of the petitioner is to be paid the amount of the civil-bill decree by the receiver.

(a) 12 M. &amp; W. 664.

(b) Peak. N. C. Ca. 95.

(c) 11 Price, 445.

(d) 12 M. &amp; W. 441.

(e) 3 M. &amp; W. 622.

If the petitioner can rely only on the seizure as giving him a right to the crops, he cannot sustain the prayer of the petition. I must consider that the surrender was complete on the 10th of September, and there is no satisfactory statement in the petition of the hour at which the seizure was made. Nothing can be more vague than the statement in the petition. The statement is:—"That the said"special bailiffs, in pursuance of such warrant, having so proceeded to levy the sum of £34. 12s. 4d., being the amount so due on said decrees, together with the costs and costs of the warrant, on or about the 10th of September 1850, made a seizure of crops growing on said lands, and being the chattels of the said Patrick Savage, consisting of a large quantity of wheat, oats, and barley, fully adequate to satisfy the amount of the petitioner's claim, and a great deal over ; and that, at the time the seizure was made on said crops, there was no one in possession of same, save the said Patrick Savage."

There is no allegation of any seizure prior to the 10th of September; and if I was to draw any conclusion from the statement, it would be that the bailiffs did not go on the land until after possession had been taken by the receiver. But this does not appear to be material ; for there had been an actual surrender executed, and consequently a legal right to the possession on the 6th of September. So far therefore as the petitioner relies on the seizure, the petitioner has no case.

Then it is contended that the decree was obtained in June 1850, and that the petitioner obtained a warrant which bears date and was signed by the Sheriff on the 2nd of July, and I have no reason to suppose that the warrant was not signed on that day. The petitioner's Counsel contends that the property in the crops would have been bound under the Statute of Frauds from the delivery of the writ, if a *fieri facias* had been sued out ; that by the Statute 2 G. 1, c. 11, s. 3 (*Ir.*), civil-bill decrees are to be executed in the same manner as executions on judgments of the Superior Courts, and therefore that the crops in this case were bound by the civil-bill decree before the surrender was executed.

If a *fieri facias* had been sued out and delivered to the Sheriff

1851.  
*Rolls.*  
DELACOUR  
v.  
FREEMAN.  
—  
*Judgment.*

1851.

*Rolls.*

DELACOUR

v.

FREEMAN.

*Judgment.*

in this case, the authorities cited by Mr. *Longfield* show that the delivery must have been of the writ *to be executed* in order to bind the goods. If a *fieri facias* be delivered to the Sheriff, and he be directed not to execute it for a month or a fortnight, the goods of the defendant will not be bound from the delivery. In this case there was no delivery of the writ to be executed. On the contrary, the Sheriff gave a warrant to special bailiffs to execute the decree. It was decided at law in the case of *De Moranda v. Dunkin* (*a*), and *Higgins v. M'Adam* (*b*), where the cases are all collected, that where the plaintiff has appointed a special bailiff the Sheriff is discharged. Therefore, obtaining a warrant from the Sheriff could not bind the goods; for it cannot be pretended that the decree was delivered to the Sheriff to be executed; and the Civil Bill Acts provide that the decree shall be executed by the special bailiff, at the peril of the plaintiff.

The question then arises, when are the goods bound, where a special warrant is given by the Sheriff to execute a writ on a judgment in the Superior Courts, or a civil-bill decree? I do not understand them to be bound by the mere signature of the warrant. I can find no case as to the effect of a special warrant; but on principle, I think it does not bind the goods from its signature. The appointment of special bailiffs discharges the Sheriff from executing the writ or decree. Suppose the plaintiff puts the warrant in his pocket and has no intention to execute it—and I think it is plain that the petitioner here had no intention to execute the warrant—or suppose the special bailiffs knew nothing of the warrant, are the goods bound? I think it would be contrary to principle to hold that they are, and I apprehend that a Court of Law would not decide that the goods are bound by the signature of the Sheriff to a special warrant (which discharges the Sheriff from liability), before it is delivered to the special bailiffs. They are the nominees of the plaintiff instead of the Sheriff. All the inconveniences which arose at Common Law from the property being bound from the teste of the writ, which were remedied by the Statute of Frauds, would arise, if a document which the plaintiff

(*a*) 4 T. R. 119.(*b*) 3 Y. & J. 1.

may or may not use, as he pleases, was to be held to cover the property. I am therefore of opinion, on consideration of the question, that the goods are not bound until the warrant is delivered to the special bailiffs.

So far from having any reason to suppose that the warrant was delivered to the bailiffs before the 6th of September, I have little doubt that they never saw the warrant until after the 6th of September. The plaintiff was probably thrown off his guard, as growing crops are not distrainable in Ireland. He thought them secure from distress and that he could seize and cut them when they became ripe. He knew nothing of the surrender, which was a *bona fide* proceeding. That is plain to me from the language of the petition.

The petitioner states "that he proceeded to the said lands on the sale day, accompanied by an auctioneer named Sheahan, and two persons named Archdeacon and Clancy, who were going to purchase the property seized as aforesaid; he was met by the said receiver, who asked petitioner where he was going, to which petitioner answered that he was going to the lands of Conagh to sell the said Savage's crops; whereupon the said receiver stated that he would not allow petitioner to do so, inasmuch as he had taken up said lands from said Savage; the said receiver, at the same time, directing his bailiff to get off the car and return to said lands, and not to permit the sale to proceed. But your petitioner sheweth that any taking up of said lands was subsequently to your petitioner's execution." The question in this case is a question of law, and if the amount in dispute was not so small, I should leave it to be decided by a Court of Law. But although the point is one of some difficulty, I decide it in order to save the parties expense. I decide it on the ground that it does not appear that there was any delivery of the warrant to the special bailiffs before the 6th of September, and therefore the crops were not bound by the decree before the surrender. But I must give the petitioner some relief, for this reason:—He brought a civil-bill against the receiver, who laid a statement of facts before the Master, and it appears that the Master directed £20 to be paid to the petitioner. It would have been more prudent for him to have accepted that

1851.  
Rolls.  
DELACOUR  
v.  
FREEMAN.

Judgment.

1851.

*Rolls.*DELACOUR*v.*FREEMAN.Judgment.

sum ; but under the circumstances I am disposed to give him £20, as the Master, so directed ; but I shall give him no costs.

Let the receiver pay the petitioner £20 in full discharge of all claim by the petitioner against the receiver, and let the receiver have credit for such payment : and it is further ordered that the petitioner do abide his own costs of said petition and this order, and let the receiver have his costs as costs in the matter, and the costs in the action at law, and let all the proceedings in the action at law be stayed.

*Rolls Petition Book, 38, fol. 32.*



In the Matter of  
**CHARLOTTE IRVINE LONG, otherwise TOTTENHAM,**  
 by CHARLES TOTTENHAM, her brother and next  
 friend, . . . . . *Petitioner;*  
**GEORGE FREDERICK LONG . . . . . Respondent.**

(*Cause Petition.*)

Nov. 6.

Where an answer is not required by the notice of a cause petition, the respondent may move for security for costs at any time before he takes a step in the cause, and before the petition is set down in the Lord Chancellor's list for hearing.

*Mr. Gayer*, for the respondent, in support of the motion.

But if interrogatories be annexed to the petition and the respondent is required to answer them by the notice he must move for security for costs before he takes a step in the cause, and before the time for answering has expired.

In England the motion may be made at any time before the defendant takes a step in the cause ; in Ireland at any time before he has taken a step in the cause unless he is in contempt.

Mr. *Miller*, for the petitioner, contended that the motion was too late, in analogy to the former practice in the case of bills, in which the motion could not be made after the time for answering had expired.

1851.  
 Rolls.  
 LONG  
 v.  
 LONG.

Argument.  
 Dec. 10.  
 Judgment.

The MASTER OF THE ROLLS.

A motion has been made in this case on the part of the respondent that the petitioner, who is a married woman, should give security for costs, her next friend residing out of the jurisdiction. The form of the notice is not quite correct ; it should be (according to the order of Sir E. Sugden in *Drinan v. Mannix* (a)) that the proceedings in the cause should be stayed until the next friend of the petitioner be changed or she shall give security for costs. I decided last Term that I should follow the decision in *Drinan v. Mannix*, notwithstanding the decision of Lord Langdale in *Dowden v. Hook*. There is, I apprehend, no distinction between the case of an insolvent next friend, and a next friend resident out of the jurisdiction.

The petition was filed on the 28th of June 1851 by the petitioner, by Charles Tottenham her brother and next friend. He is described in the petition as Charles Tottenham of Macmorrough in the county of Wexford. No interrogatories have been annexed to the petition or filed. Notice of the petition was served on the respondent's solicitors on the 10th of July, an order to substitute service having been made. That notice concluded as follows :—"And take notice that after the expiration of two months from the service of this notice on you, the said petition will be set down to be heard in the Lord Chancellor's List of Cause Petitions, according to the course of the Court ; and *you are at liberty, if so advised,* to answer the matter of the said petition by affidavit within the period aforesaid."

One of the respondent's solicitors has made an affidavit stating that he made inquiries from the petitioner's solicitor where the said Charles Tottenham resided, and was, on or about the 16th of August, informed by him that the said Charles Tottenham had for the last two or three years resided in England ; and the respondent's solicitor further states in said affidavit, that he has been informed and

(a) 3 Dr. & War. 161.

1851.

Rolls.

LONG

v.

LONG.

Judgment.

believes that, for the last five or six years, the said Charles Tottenham has not resided at Macmorrough, but has resided in France or England, and that a receiver has been appointed over the property by the said Charles Tottenham in the cause of *Johnson v. Tottenham* and is still in possession.

On the 26th of August last the respondent's solicitor served a notice on the petitioner's solicitor, in which it is stated, that "inasmuch as the respondent's solicitors were informed that Charles Tottenham, the next friend of the petitioner, described in the petition as of Macmorrough, in the county of Wexford, is not, nor has been for a considerable time previous to the filing of the petition, residing at Macmorrough, and has been resident in England or elsewhere, out of the jurisdiction of the Court; we hereby, by the directions of the respondent, call upon you to state within one week from the date hereof whether you are willing to give security for costs; and we hereby inform you that in case you refuse or decline to give said security, or to reply to this notice within the period aforesaid, it is the intention of the respondent to apply to the Court to stay further proceedings until security for costs shall be given, and that this notice will be used to charge you with the costs of any motion rendered necessary by such refusal; and we caution you against taking any proceedings in the meantime." No answer having been given to the said notice, notice of motion was served on the 9th of October, and was in the Vacation list.

The motion therefore was moved at the earliest period which it could have been moved, as the last day for serving notices for Trinity Term had elapsed when the petition was filed. The cause petition has not been set down, and no step has been taken in the matter by the respondent. The petitioner insists that, the notice of the cause petition having been served on the 10th of July, and the two months for answering therein mentioned having expired on the 10th of September, the notice of motion of the 9th of October is too late.

According to the cases in England, a motion that the plaintiff should give security for costs may be made at any time before the defendant shall have taken a step in the cause; and if it does not

appear on the face of the bill that the plaintiff is resident out of the jurisdiction, the defendant may apply at any time before he shall have taken a step, after he has had knowledge of the fact that the petitioner is resident out of the jurisdiction.

The petitioner's Counsel, however, contends that, according to the practice in this Court, a defendant in a cause could not move that the plaintiff should give security for costs on a notice served after the time for answering had expired; and that therefore, where a cause petition is filed, and notice thereof is given, the notice of the motion must be served before the time for setting down the cause has expired.

The cases on the subject are referred to in *Long v. Tottenham*(a); and no doubt the late Master of the Rolls held, in a case not reported, that the notice of motion must be served before the time for answering had expired, and I have followed that decision. The ground of that practice, however, was that the defendant, having expressly disobeyed the subpoena, was in contempt, and could not therefore apply to the Court. If the contempt was purged by filing the answer, the motion could not be made, for then the defendant had taken a step in the cause.

The question is, whether those decisions are applicable in cases of cause petitions?

If an order is made that the respondent should answer interrogatories, the form of order framed under the New General Rules directs the respondent to answer such interrogatories within a time specified in the order; and if the defendant disobeys such order, he is in effect guilty of a contempt of Court, and an attachment may issue to enforce an answer: and in such case I apprehend the cases to which I have referred would apply, and the notice of motion should be served before the time for answering the interrogatories had expired. If, however, no interrogatories are filed, it is optional with the respondent whether he will file an answering affidavit. There is no general or other order of the Court or subpoena requiring him to answer.

If I should decide that the notice of motion must be served before

1851.  
Rolls.  
LONG  
v.  
LONG.

*Judgment.*

1851.  
Rolls.

LONG

v.

LONG.

Judgment.

the time for setting down the cause petition had expired, I should introduce a new rule of practice unknown in England or Ireland. In England the motion may be made at any time before the defendant takes a step in the cause; in Ireland, at any time before he has taken a step in the cause, unless he is in contempt.

The form of the subpoena, where a bill is filed, is given in the appendix to Mr. Smith's edition of *Sir E. Sugden's Orders*, p. 34, and the defendant is thereby commanded to answer within two months, &c., upon pain of process against his person and property in case of neglect. In the case of cause petitions, to which interrogatories are not annexed, the respondent is guilty of no contempt in not answering.

If the cause petition had been actually set down in the Lord Chancellor's list, under the 18th of the recent General Orders, before service of the notice of motion, or before the motion was heard, it may be doubtful whether I should be justified in making an order which would have the effect of staying the hearing of the petition; but in the present case the petition has not been set down, and I am of opinion that I should make an order similar to that made in *Drinan v. Mannix*.

The present case might perhaps be decided in favour of the respondent, on the ground of the misdescription in the petition of the residence of the next friend: *Ex parte Foley* (a); as also on the ground that the notice of the 26th of August was served within the period for answering mentioned in the notice served on the 10th of July; but I have thought it better to state my opinion on the other question which arises, as it is likely to occur again. The order I shall make is, that the proceedings in this matter be stayed until the next friend of the plaintiff be changed or she shall give security for costs; refer it to the Master to measure the amount and approve of such security. Let the costs of this motion be costs in the cause.

(a) 1 Beav. 458.

1851.  
Rolls.

WILLIAM IRELAND and Wife, . . . . . *Petitioners.*  
 WILLIAM WILSON, . . . . . *Respondent.*

## In re Renewable Leasehold Conversion Act.

June 13, 17,  
Nov. 5.

THE petition in this matter prayed that the grants in the petition mentioned might be executed by the respondent of the lands comprised in two original leases, bearing date respectively the 20th of February 1816, subject to the payment of a perpetual fee-farm rent, agreed upon between the petitioners and the said William Wilson, and subject to the like covenants, conditions, reservations and exceptions as are contained in the said original leases respectively.

The quantity of land demised by the two leases was 318A. The draft of the fee-farm grant conveyed the lands, describing them by the same boundaries as in the original leases. The petitioners contended that an additional quantity of land, amounting to 120A., passed under that description. The respondent, on the other hand, contended that this additional quantity was an encroachment by the tenant, and had been demised by a former owner of the reversion by a lease of the 2nd of May 1823, and he required that this question of encroachment (which was the only question between the parties) should be determined before the execution of the grant. The facts are stated at length in his Honor's judgment.

The *Solicitor-General* and Mr. H. *Smythe*, for the petitioners — As to additional lands passing by the original lease, cited *Dawson v. M'Intyre* (a). As to the right of renewal, and therefore to a fee-farm grant—*Trant v. Dwyer* (b); *Fitzgerald v. Carew* (c); *Malone v. Gerahy* (d).

Where the boundaries have been confused, or land has been encroached on by the tenant, the question of boundary or encroachment should be determined before a fee-farm grant is executed under the Renewable Leasehold Conversion Act, either by ejectment, or, if there be an outstanding legal estate (as in this case), by an issue.

Form of the order directing an issue.

*Semble.*— The Court has no jurisdiction, on a petition under the said Act, to issue a commission to ascertain the boundaries.

(a) 12 Cl. &amp; Fin. 151.

(b) 1 Dow. &amp; C. 125; S. C. 2 Bl. N. S. 17.

(c) 1 Ir. Eq. Rep. 346.

(d) 5 Ir. Eq. Rep. 549.

1851.

Rolls.IRELANDv.WILSON.Nov. 5.Judgment.

**Mr. Brewster** and **Mr. Tudor**, for the respondent, cited **Lord Courtown v. Ward** (*a*) ; **Boyle v. Olpherts** (*b*) ; **McCausland v. Douglas** (*c*).

**The MASTER OF THE ROLLS.**

In this case a petition has been presented under the Renewable Leasehold Conversion Act, by which the petitioners pray that the respondent may execute to them, under the provisions of the said Act, grants in fee-farm of the lands and premises included respectively in two leases, bearing date the 20th February 1716, and hereinafter more particularly referred to.

The facts of the case are as follow :—

On the 20th February 1716, Dr. Edward Smyth, the then Lord Bishop of Down and Connor, demised to John White all that the farm and lands of part of Blackwood, called the demesne of Blackwood, Wyseland, Drumen, *alias* Comon, Glassebane, and one acre in Greages, with the mill and land thereunto belonging, *bounded on the east with the Red Bog*, on the south with Downings and Greages, on the west with John Dunn's holding in Blackwood, and on the north with Patrick and William White's holding in said town, containing  $215\frac{1}{2}$  acres, be the same more or less, then in the actual possession of the said John White and his undertenants, situate in the barony of Clane in the county of Kildare, excepting out of said demise all mines and minerals, and with liberty of hunting, hawking, and fishing; to hold for three lives, therein mentioned, at the rent of £67. 5s. 10d. The said lease is stated in the petition to contain a covenant for perpetual renewal, on the payment of a fine of a quarter of a year's rent on the fall of each life. I have not seen any copy of the lease, but this is not disputed.

On the same day the said Lord Bishop demised unto John Dunn all that the farm and lands called the Broka, being part of the town and lands of Blackwood aforesaid, containing  $102\frac{1}{2}$  acres, be the same more or less, then in the possession of the said John Dunn and his undertenants, situate in the barony of Clane and county of Kildare,

(*a*) 1 Sch. & Lef. 8.

(*b*) 4 Ir. Eq. Rep. 241.

(*c*) Hayes, 254.

bounded on the east with John White's holding in said town, on the south with Greages, and *on the west and north with the Red Bog*, excepting out of said demise all mines and minerals, and with liberty of hunting, hawking, and fishing ; to hold for three lives therein mentioned, at the rent of £27. 2s. 2d. The latter lease is stated in the petition to contain a covenant for perpetual renewal, on payment of a fine of a quarter of a year's rent on the fall of each life. I have not seen any copy of the lease, but this is not disputed.

The estate and interest in the said two leases became vested in William Wilson, the younger, who died in 1787, leaving [three daughters his co-heiresses-at-law.

Dora, the eldest daughter, married Francis P. Ward ; Anne, the second daughter, married Ebenezer Low ; and Frances, the youngest daughter, married Samuel Gardiner.

Samuel Gardiner and Frances his wife died, leaving the petitioner Dorothea their only child and heiress-at-law.

A deed of partition was executed on the 21st of July 1808, pursuant to a decree of the Court of Exchequer, between the said F. P. Ward and Dora his wife, of the first part, Ebenezer Low and Anne his wife, of the second part, and the petitioners William Ireland, and Dorothea his wife, of the third part, whereby the said lands contained in the said two leases were partitioned and allotted amongst the said parties as follows : that is to say, the lands of Broka, contained in the lease of the 20th February 1716, made to John Dunn, were allotted to Ward and wife, subject to the payment of the head rent and renewal fines. The lands comprised in the other lease of the 20th of February 1716 were, as I understand the case, divided and partitioned in certain proportions between Low and wife, and the petitioner William Ireland and Dorothea his wife ; the latter entering into a covenant with Low and wife to pay the whole of the head rent issuing out of the lands demised by the lease of the 20th of February 1716 to John White, and to get or procure renewals of the original lease thereof.

Dora Ward survived her husband, and afterwards died without issue, and by her will devised twenty-six acres of the said lands of

1851.  
Rolls.  
IRELAND  
v.  
WILSON.  
—  
Judgment.

1851.  
 Rolls.  
 IRELAND  
 v.  
 WILSON.  
 Judgment.

Broka to one Margaret Draper and her heirs, free and discharged from all head rent and renewal fines, and by her said will she devised the remainder of the said lands of Broka to her niece the petitioner Dorothea and her heirs, subject to the payment of the entire head rent and renewal fines; and also to the payment of her debts and legacies.

The petition alleges that the debts amounted to £800; that the said sum was the value of the premises, and has been discharged by the petitioner William.

The reversion in the lands demised by the two leases of the 20th of February 1716 became vested in the Earl of Courtown, and by indenture dated the 5th of March 1832 his Lordship granted a renewal of the lands of Broka to the petitioners William Ireland and Dorothea his wife for three lives, all now in being (it is not stated whether the renewal was to the petitioners William and Dorothea and their heirs, or to the petitioners and the heirs of Dorothea); and by indenture of the 23rd of November 1841 the said Earl granted a renewal of the lands of Blackwood (and its subdenominations of Wyseland, Drumen *alias* Comen, and Glassebane as demised by the lease of the 20th of February 1716 to John White), to hold to the said petitioners for three lives, all now in being. It is not stated whether this renewal was to the petitioners and their heirs, or to the petitioners and the heirs of Dorothea.

About eight or nine years ago the Earl of Courtown conveyed the reversion of the lands comprised in the said two leases of the 20th of February 1716 to the respondent William Wilson, Esq., to whom the rent has since been paid.

On the 5th of June 1850 the petitioner furnished to the respondent William Wilson for his approval a draft of a grant in fee-farm, under the provisions of the Renewable Leasehold Conversion Act, of the lands comprised in the lease of the 20th of February 1716 to John White, describing the premises as in the original lease.

The question in dispute between the parties is,—what was demised by the two leases of 1716?

The respondent in his answering affidavit states that the leases of 1716 respectively contain a covenant that the lessee, his heirs and

assigns, would well and sufficiently support, maintain and keep up in staunch and tenantable order and repair the boundaries of the demised premises ;—that the quantity of land demised by the lease to John White was two hundred and fifteen acres and a-half, and to John Dunn one hundred and two acres and a-half, making together three hundred and eighteen acres,—and that the petitioners claim about four hundred and forty-six acres as demised by the said two leases, showing an excess of upwards of one hundred and twenty acres beyond the quantity actually demised,—there having been, as the respondent alleges, an encroachment in the case of each of the said leases of 1716 by the petitioners.

The way in which these encroachments took place, according to the case made by the respondent, was this :—In the year 1780 the Grand Canal Company made a cut or branch through the Red Bog (which is stated as one of the boundaries in the said two leases), in such a way that about eighty acres of the Bog became bounded on three sides by the canal cut, and on the fourth side by the demised premises. The Red Bog is stated in the lease of 1716, made to John White, to be the eastern boundary of the demised premises, and the lease of 1716 made to John Dunn states that the premises thereby demised were bounded on the west and north by the Red Bog.

The petitioners insist that the canal cut was made along the boundary of the demised premises, separating them from the Red Bog.

The respondent insists that the canal cut was made through the Red Bog, and that the portion of the Red Bog separated from the rest by the said cut is the estate in fee of the respondent, subject to a lease made on the 2nd of May 1823, by the Earl of Courtown, from whom the respondent purchased, to the petitioner William Ireland.

The respondent further alleges that the turf on the portion of the Red Bog, thus inclosed by the canal cut, having been cut out, and that portion of the bog having become to a considerable extent drained, and fit for pasturage, is what is called, in the petition, moory pasture, bottom land.

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The respondent then insists that neither the Earl of Courtown nor he were parties to the deed of partition, or in any manner bound thereby, so far as same purported to divide a greater quantity of land than was demised by the two leases of 1716.

The affidavit of the respondent then states the lease of the 2nd of May 1823, whereby the then Earl of Courtown demised to the petitioner, William Ireland, certain portions of the Red Bog therein particularly described, to hold to the said William Ireland and his heirs, for the life of Samuel Gardiner Ireland; and the respondent insists that the portion of the Red Bog claimed by the petitioners, as having been demised by the leases of 1716, was in fact included in the lease of 1823, and that the petitioners, having defaced and confused the boundaries between the premises demised in 1716 and in 1823, seek to claim the portion of land called, in their petition, moory pasture land, as part of the premises demised in 1716, such portion being in fact part of the Red Bog, one of the boundaries stated in the leases of 1716, and included in the premises demised by the lease of 1823.

A copy of the proposed fee-farm grant of the lease of the 20th February 1716, made to John White, has been engrossed by the petitioners, and the granting part is as follows:—"And this indenture witnesseth, that in compliance with the provisions of the said recited Act (that is, the Renewable Leasehold Conversion Act), and for and in consideration, &c., he the said William Wilson (the respondent) doth grant and confirm unto the said William Ireland and Dorothea Ireland otherwise Gardiner his wife (in their actual possession, &c.), and to their heirs or assigns, all that and those the lands and farm of part of Blackwood, called the demesnes of Blackwood, Wyseland, Drumen, *alias* Comon, Glasbane, and one acre in Greages, with the mill and land thereunto belonging, and which in said original lease are stated to be bounded as follows;" and then follows a statement of the boundaries exactly taken from the original lease. The respondent, however, contends that as the petitioners allege that the portion of land in dispute will pass under the said description, the question should now be determined, and should not be postponed until the expiration of the lease of 1823, at which period the

respondent may find it more difficult than at present to have the question of boundary ascertained.

The respondent does not in any manner dispute his liability to grant in fee-farm the lands included in the leases of 1716 under the provisions of the statute. The only question in dispute is the part and parcel question.

The respondent, by his affidavit, seeks that I should refer it to the Master to settle the conveyance, but it would not be reasonable to cast upon the Master the decision of the question of boundary.

I have felt some difficulty as to the course to be pursued. In the case of *Trant v. Dwyer* (a), a bill was filed by the tenant for the specific performance of a covenant for perpetual renewal, the defendant having refused to renew; one of the grounds of refusal being that the plaintiff had made an encroachment on the estate of the defendant.

The Court of Exchequer in Ireland, when the cause came on for hearing, ordered the cause to stand over, with liberty to the defendant to bring an ejectment for such part of the premises as he should be advised, the object of the order being to have the question, whether or not there had been an encroachment, decided before the renewal was decreed. The defendant succeeded in the ejectment, thereby establishing that there had been an encroachment to the extent of 234 acres or thereabouts. On the final hearing of the cause, the Court of Exchequer decided that the plaintiff was entitled to a decree for a specific performance, on payment of the rent and renewal fines, and of all costs at law and the costs of the cause; and the decree amongst other matters directed, "That in case the parties differed about the description of the premises, or otherwise about the terms of the renewal, it should be referred to a Baron to settle and approve of a draft thereof, having regard to the said verdict, so as not to include in the said renewal a demise of any part of the bog so recovered." The decree of the Court of Exchequer was affirmed by the House of Lords. Lord Lyndhurst, in giving judgment, no doubt said that "if the landlord had been at all anxious about the fine—if that had been the real object of contest

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between the parties, it was easy for him to offer to renew the lease on the old terms, in the language of the original lease, and without any prejudice to the question of encroachment." The course, however, adopted by the Court of Exchequer, of having the question of encroachment decided before the renewal was granted, and having the part which appeared to have been encroached excluded from the renewal, was not objected to in the judgment in the House of Lords; and it would appear not to be reasonable to the respondent, where the petitioners admit they claim a very considerable extent of acreage beyond that in terms demised by the leases of 1716, to require the respondent to execute fee-farm grants, stating the boundaries as in the original leases, the petitioners being in possession of the disputed portion, and the respondent being unable to bring an ejectment, his case being that the disputed portion was included in the lease of 1823 to the petitioner William Ireland, which lease is for a life still in being.

I have been furnished by Counsel on each side with the order which each party proposes should be made, but in each order it is proposed that an ejectment should be brought. If the question was simply one of alleged encroachment, I should follow in substance the order of the Court of Exchequer in the case of *Trant v. Dwyer*, but the question in this case is not properly so much a question of encroachment as a question of boundary; that is to say, whether the part in dispute is included within the leases of 1716, or the lease of 1823? The respondent admits he has no legal title, his case being that the portion in dispute was demised by the lease of 1823, which lease is still subsisting. I do not therefore see how the question can be decided by ejectment.

The most satisfactory course would be to issue a commission to ascertain the boundaries; but I apprehend I have no jurisdiction on this petition to issue such a commission. If the petitioners have confused the boundaries under circumstances which would give a Court of Equity jurisdiction, such jurisdiction could only be exercised upon a bill or petition by the respondent under the Court of Chancery (Ireland) Regulation Act. The cases in which Courts of Equity exercise jurisdiction in case of confusion of boundaries are

referred to in the case of *O'Hara v. Stronge* (*a*), and in the note to *Wake v. Conyers—Leading Cases in Equity*, vol. 2, p. 323.

On the whole, I think the only mode of ascertaining the matter in dispute is by directing an issue. I have drawn up the leading order; but in order that the question may be clearly brought before the jury, and that the party in the wrong may be made liable for all costs, I shall require the parties to have a trace made on a copy of the Ordnance Survey map, clearly pointing out the part in dispute. A reference to such map, by the leading order in the manner in which such order is drawn up, will prevent any difficulty in having the real matter in dispute finally ascertained upon the trial of the issue.

I observe that Mr. and Mrs. Low and Margaret Draper have no notice of this petition. It is of course necessary before any order is entered that they should have notice, as they are or may claim to be interested in the question.

As soon as the map or maps shall be prepared, the order shall be entered.

The maps having been made, the following order was made in Hilary Term 1852:—

The petitioners and respondent having had traces made on copies of the Ordnance Survey map of the lands and premises which they respectively contend were within the boundaries of the respective leases of the 20th day of February 1716, let same be signed by the Registrar: and the petitioners insisting that the portion marked on the respondent's map with the letter A, and coloured yellow, was included within the boundaries of the lease of the 20th of February 1816, executed by Doctor Edward Smyth, then Lord Bishop of Down and Connor, to John White, and that the portion marked on the respondent's map with the letter B, and coloured blue, was included within the boundaries of the lease of the 20th of February 1716 from the said Lord Bishop of Down and Connor to John Dunn; and the respondent insisting that the portions coloured yellow and

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(*a*) 11 Eq. Ir. Rep. 262.

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blue on the respondent's map, and marked with the letters A and B, were not included within the boundaries of said leases respectively ; let said petition stand over, and let an issue be tried at the next Assizes for the county of Kildare by a special jury of the said county, to try and inquire, first, whether the portion of land or bog coloured yellow and marked with the letter A on the respondent's copy of the Ordnance Survey map, or any and what part thereof, was included within the boundaries in the lease of the 20th of February 1716 from the then Lord Bishop of Down and Connor to John White ; secondly, whether the portion of land or bog coloured blue and marked with the letter B on the respondent's said copy of the Ordnance Survey map, or any and what part thereof, was included within the boundaries of the said lease of the 20th of February 1816 from the said Lord Bishop of Down and Connor to John Dunn ; and let the petitioners be plaintiffs in the said issue ; all matters of form to be admitted ; and let there be a clause of view in the distingas ; and reserve further order and the question of costs.

*Rolls Petition Book, 41, fol. 86.*

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## LYMBERRY v. HELSHAM.

Dec. 3.BLOOD, *Petitioner* ; HELSHAM, *Respondent*.

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A receiver had been appointed in the cause of *Lymberry v. Helsham* over the tithe rentcharge, and other ecclesiastical dues, of a living of which the defendant the Reverend Henry Helsham was the incumbent. A petition was presented in the matter to extend the receiver to two judgments under the 5 & 6 W. 4, c. 55, and 3 & 4 Vic. c. 105. The facts are fully stated in the judgment.

A receiver cannot be appointed or extended over tithe rentcharge by petition under the 5 & 6 W. 4, c. 55, or 3 & 4 Vic. c. 105.

**Mr. Hemphill**, for the petitioner.

Prior to the 3 & 4 Vic. c. 105, it had never been decided whether or not a benefice with cure of souls could be extended under an elegit. An advowson in gross could not be extended because it was not capable of being appraised. But there was not the same objection to ecclesiastical tithes being extended. However, difficulty might have arisen as to the extending of tithes, not on the grounds of public policy, but from the nature of the property. The *Statute of Westminster* 2 uses the word "land," and it might have been held that land did not include tithes either spiritual or lay. But there was no express decision at the time of the passing of the 3 & 4 Vic. c. 105, that tithes were not extendible: *Gilbert on Executions*, pp. 38, 39; *Harwood v. Payte* (a). Bishop's lands and Abbey lands were extendible: *Bro. Abr., Elegit*, 1, 8, 9. An ejectment might have been brought for tithes both lay and spiritual: *Baldwin v. Wyre* (b). By the English statute of 13 Eliz. c. 20, clergymen were prevented from charging their benefices or alienating their tithes, which in the early period of English history and until the thirteenth century were alienable. The statute of Eliz. was in force in England at the passing of the Statute of Frauds, and influ-

(a) *Styles*, 161, 168.(b) *Cro. Car.* 301.

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enced the Courts in holding that tithes could not be extended under the latter statute. But in this country there is nothing in the statute law to prevent a clergyman from charging his benefice: *Robinson v. Wynne* (*a*) ; *Wise v. Beresford* (*b*). This case therefore is not embarrassed by the only difficulty which Lord Cranworth had to deal with in his decision in *Hawkins v. Gathercole* (*c*). In that case it was held that a judgment was a charge on ecclesiastical tithes under the 1 & 2 *Vic.* c. 110, s. 13, which corresponds *verbatim* with the 3 & 4 *Vic.* c. 105, s. 22. If the word "tithes" in the 22nd section includes ecclesiastical tithes, the same word "tithes" must have the same meaning in the 19th section, by which the Sheriff is authorised to deliver execution of "rectories and tithes." Tithes therefore are extendible under this statute, and if so, we are entitled to a receiver under the first part of the 21st section. But the remedy by receiver is by no means co-extensive with the right to issue an elegit. The latter part of the 21st section gives power to the Court to appoint a receiver, on petition, over "any property of such judgment debtor, which such judgment creditor would or could make available for the payment of his judgment debt by filing (after a writ of execution had been issued and returned at law on such judgment) a bill in a Court of Equity, or by *any writ of execution at law*, or (subject to the proviso hereinafter contained) by petition under the provisions of this Act." The words of the section are very large; and this, being a remedial statute, should be construed liberally, so as to extend to every property which the judgment creditor could have availed himself of in a Court of Equity under the 22nd section: *Smith v. Egar* (*d*) ; *M'Dermott v. Moylan* (*e*) ; *Hackett v. Farrell* (*f*) ; *Reilly on Receivers*, pp. 76, 77. These are "tithes" over which the respondent had, at the time of entering up the judgment, "a disposing power" within the 22nd section. By the 21st section a judgment creditor may have a receiver over any "property of the judgment debtor which such creditor would or could make available for the payment of his judgment debt, &c.,

(*a*) *Hayes*, 336.(*b*) 3 *Dr. & War.* 276.(*c*) 1 *Sim.*, N. S. 63.(*d*) *Sausse & Sc.* 238.(*e*) *Longf. & T.* 555.(*f*) 4 *Ir. Eq. Rep.* 520.

by *any writ of execution at law.*" The petitioner might have made this property available by a sequestration; and a sequestration is "a writ of execution at law," though directed to the Bishop. The case of *Cassidy v. Hopkins* (a) is not an authority for a limited construction of the latter part of the 22nd section; for in that case the property could not be made available for the judgment directly, but only through the medium of a plenary suit. The objection on the ground of policy may be removed, for provision may be made in a petition matter under this Act as well as in a plenary suit. In this case no such inconvenience will arise, for that provision has already been made in the cause.

#### The MASTER OF THE ROLLS.

Two judgments were obtained in Michaelmas Term 1841, by one Catherine Blood, against the respondent, the Rev. Henry Helsham, each for the sum of £200. The said Catherine Blood having died, the petitioner, John Vincent, obtained administration with the will annexed to the said Catherine Blood, and issued writs of *scire facias*, and obtained judgments of revival on the 24th of October 1850, and on the 15th of October 1851 the said John Vincent presented a petition under the 5 & 6 W. 4, c. 55, and 3 & 4 Vic. c. 105, and has moved that the receiver appointed in the cause of *Lymberry and Smith v. the said Rev. Henry Helsham*, over the rentcharge in lieu of tithes and tithe composition, and all other ecclesiastical dues and emoluments accruing out of the Union of Rosbercon, Dysartmore, Shambo, Ballygowran, and Kilmackavogue, in the county of Kilkenny and diocese of Ossory, to which the said respondent is entitled as rector, may be extended to this matter, for payment of the sums due to the petitioner.

The question which arises in this case is, whether under the said statutes, or either of them, a receiver can be appointed over tithe rentcharge, or if the receiver has been appointed in a cause, whether he can be extended to the matter?

It is enacted by the 5 & 6 W. 4, c. 55, s. 31, that "It shall be lawful for any person entitled to sue out, or who already has sued

(a) 10 Ir. Eq. Rep. 208.

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*out* a writ of elegit upon any judgment recovered in any of his Majesty's Courts at Dublin, or to issue, or who has issued, execution in any suit or proceeding on any recognizance there, to apply by petition to the Court of Chancery, &c., for an order that a receiver may be appointed of the rents and profits of the entire, and not a moiety only, of all lands, tenements and hereditaments which he would be entitled to have extended or appraised under a writ of elegit, or extended, seized or taken under a writ of *levari facias*, or other proceeding on such recognizance, or to have a receiver thereof appointed by that Court extended to that matter; and it shall be lawful for the Court to appoint or extend a receiver accordingly over the whole thereof, or over so much thereof as shall appear to it sufficient for the purpose of paying the sum due on such judgment or recognizance."

The provisions of that Act were amended by the 3 & 4 Vic. c. 105; and it is enacted by the 21st section of the latter statute that "It shall be lawful for any person entitled to sue out, or who has already sued out, a writ of elegit upon any judgment recovered in her Majesty's Courts of Dublin, or to issue, or who has issued, execution in any suit or proceeding on any recognizance there, to apply by petition to the Court of Chancery &c., for an order that a receiver may be appointed over any lands, tenements, *rectories*, *tithes*, annuities, rents or hereditaments by this Act made liable to be seized, extended, appraised or taken in execution on any such judgment." The section then contains a provision authorising an application, by petition, to appoint a receiver over Government stock, &c., which has no bearing on the question which arises in this case; and the section then proceeds to enact "That in proceeding under "the 5 & 6 W. 4, c. 55," and this Act, the said Court of Chancery, &c., shall have power to appoint or extend a receiver in a summary way, on a petition at the instance of such person, over any property of such judgment debtor, which such creditor (*i. e.* any person entitled to sue out or who has sued out an elegit) would or could make available for payment of the judgment debt, by filing (after a writ of execution had been issued and returned at law upon such judgment) a bill in a Court of Equity, or by any writ of exe-

cution at law, or (subject to the proviso hereinafter contained) by petition under the provisions of this Act; and it shall be lawful for the Court to appoint or extend a receiver accordingly over the whole thereof, or over so much thereof as shall appear to be sufficient for the purpose of paying the sum due on such judgment or recognizance." What "the proviso hereinafter contained" advert's to is not very clear, as there is no proviso in that section; possibly it may be the proviso in the 22nd section. Nothing, however, appears to turn upon that in the present case. The entire of this part of the section is obscure, and difficult to understand.

Two questions are to be considered: first, the construction of the 31st section of the 5 & 6 W. 4, c. 55, and the construction of the first part of the 21st section of the 3 & 4 Vic. c. 105; and secondly, the construction of the latter portion of that section to which I have referred.

With respect to the 5 & 6 W. 4, it authorises a party entitled to sue out, or who has sued out, a writ of *elegit* on any judgment, to apply by petition for an order that a receiver may be appointed of the rents and profits of the entire "of all lands, tenements and hereditaments which he would have been entitled to have extended or appraised under a writ of *elegit*."

The 21st section of the 3 & 4 of the Queen uses the words "lands, tenements, *rectories*, *tithes*, annuities, rents or hereditaments," but then follow the words "by this Act made liable to be seized, extended, appraised, or taken in execution on any such judgment."

As the receiver is, therefore, by the 21st section, to be appointed over the "lands, tenements, rectories, tithes," &c., by the said Act liable to be seized, extended, appraised, or taken in execution, it is necessary to refer back to the 19th section, to ascertain what lands, tenements, rectories, tithes, &c., are liable to be so seized, extended, &c., and whether the words "rectories and tithes" in the 19th section include ecclesiastical rectories and tithes.

The 19th section, amongst other things, enacts, that "It shall be lawful for the Sheriff or any other officer to whom any writ of *elegit* or any precept in pursuance thereof shall be directed, at

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the suit of any person, upon any judgment which at the time appointed for the commencement of this Act, '1st November 1840,' shall have been recovered, or shall be thereafter recovered, in any action in any of her Majesty's Superior Courts at Dublin, to make and deliver execution unto the party in that behalf suing, of all such lands, tenements, *rectories*, *tithes*, rents and hereditaments, including lands and hereditaments which may be of copyhold tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit, in like manner as the Sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of elegit is sued out: which lands, tenements, rectories, tithes, rents and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account, in the Court out of which such execution shall have been sued out, as a tenant by elegit is now subject to in a Court of Equity."

The late Master of the Rolls, in his judgment in the case of *Digby v. Irvine* (a), in adverting to the 19th section, stated:—"In ascertaining the object of that section, and its due construction, it is necessary to inquire what the law was before the enactment of the statute, and what were the mischiefs it was intended to remedy." In a subsequent passage of the judgment (page 155) his Lordship stated:—"There is not a single intimation of the intention of the Legislature to enlarge the description, or change the character of, the estates which might be extended upon an elegit under the Statute of Westminster, or the Statute of Frauds."

It is therefore proper and necessary, in seeking to arrive at a true construction of the 19th section of the statute, to consider what the law was under the Statute of Westminster, and the Statute

(a) See *Digby v. Irvine*, 6 Ir. Eq. Rep. 153.

of Frauds, and whether tithes and other ecclesiastical property could, under those statutes, be extended under an elegit.

In *Lord Coke's Commentary on Magna Charta* (a), he explains the clause in the charter, which relates to the clergy, thus :—" That all ecclesiastical persons shall enjoy all their lawful jurisdictions and other their rights wholly without any diminution or subtraction whatsoever." And in page 4 he states what those rights and privileges were ; and amongst other matters he states that " if a person be bound in a recognizance in the Chancery or in any other Court, &c., and he pay not the sum at the day, by the Common Law, if the person had nothing but ecclesiastical goods, the recognizee would not have had a *levavi facias* to the Sheriff to levy the same of those goods ; but the writ ought to be directed to the Bishop of the diocese to levy the same of his ecclesiastical goods."

*Lord Coke*, in his *Commentary on the Statute of Westminster* (b), and upon the words "*medietatum terra sue*," says :—" It is to be observed that the general words of the Act do not take away the privilege which the law giveth to any person."

The Statute of Westminster the Second authorises the Sheriff to deliver to the plaintiff all the chattels of the debtor (saving only his oxen and beasts of his plough), and the one-half of his land, until the debt be levied upon a reasonable price or extent.

Although the word "lands" is used in the Statute of Westminster, yet tenements were held to be extendible under an elegit.

Thus a rentcharge was held to be extendible : *Bro. Elegit*, p. 13 ; *Moor*. p. 32 ; and so also a reversion : *Gilbert on Execution*, p. 38.

By the Statute of Frauds, 29 Car. 2, c. 3, s. 10 (*Eng.*), 7 W. 3, c. 12, s. 12, s. 7 (*Ir.*), it was enacted " That it shall and may be lawful for every Sheriff, &c., to whom any writ or precept is or shall be directed, at the suit of any person or persons, of, for or upon any judgment, &c., to do, make and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents and hereditaments, as any other person or persons be in any manner or wise seized or possessed, or hereafter shall be seized or possessed, in trust for him against whom execution is so sued, *like as* the

(a) 2 Inst. 3.

(b) 2 Inst. 395.

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Sheriff or other officer might or ought to have done if the said party, against whom execution hereafter shall be so sued, had been seized of such lands, tenements, *rectories*, *tithes*, or other hereditaments of such estate as they be seized of, in trust for him at the time of the said execution sued; which lands, tenements, *rectories*, *tithes*, rents, and other hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed, freed and discharged from all incumbrances of such person or persons as shall be so seized or possessed, in trust for the persons against whom such execution shall be sued."

The words "lands, tenements, rectories, tithes, rents and hereditaments," in the 19th section of the 3 & 4 of the Queen, are obviously taken from the Statute of Frauds.

It has never been held that either the Statute of Westminister or the Statute of Frauds subjected ecclesiastical property to be extended under a *elegit*.

The law on this subject is laid down in the case of *Arbuckle v. Cowtan* (a). In that case it was decided, that the profit of an ecclesiastical benefice did not pass to the assignees under an Insolvent Act, although included in the schedule of the insolvent. Lord Alvanley mainly rested the judgment of the Court on the rule of law which prevented ecclesiastical property being taken in execution, unless by means of a writ to the Bishop, who was bound to take care that out of the revenues of the church the duties of the church should be provided for. Lord Alvanley says—"It must be argued, that although the Insolvent Act does not expressly make the assignees vicars, yet that it invests them with all the ecclesiastical rights of the vicar. It is material to consider how the Common Law stood with respect to the rights with which creditors of persons in holy orders and beneficed clerks were clothed. No one is ignorant that, at Common Law, land could not be taken into the hands of the creditor himself; the profits only could be taken by a writ of *levavi facias* directed to the Sheriff, who was thereby empowered to levy the profits arising from time to time, for the benefit of the creditor. The Common Law was extremely jealous of

(a) 3 B. & P. 326.

obtruding any new tenant on the lord; it did not allow, therefore, any possession to be taken under the *levari facias*, but only the profits to be levied. By the Statute of Westminster 2, which gave the writ of *elegit*, an alteration was introduced in this respect. By that Act the creditor was permitted to make use of a process by which he was put into possession of the land itself. At all times, however, the King was entitled to take possession under an extent; for the objection to changing the tenant did not apply to the case of the King. His right was independent of the Statute of Westminster 2; but it must not be forgotten, that while the Common Law remained unaltered, the King never claimed any authority to take possession of ecclesiastical rights or dues by the hands of his own ministers, the Sheriffs. He was always obliged to have recourse to a writ to the Bishop, under which the lands were sequestered. Under that writ possession was not given; but the ordinary was bound to take care that out of the revenues of the church the duties of the church should be provided for. We find in 2 *Inst.* p. 4, that Lord Coke says—‘If a person be bound in a recognizance in the Chancery, or in any other Court, &c., and he pay not the sum at the day, by the Common Law, if the person had nothing but ecclesiastical goods, the recognizee would not have had a *levari facias* to the Sheriff to levy the same of those goods; but the writ ought to be directed to the Bishop of the diocese to levy the same of his ecclesiastical goods.’ In *Gilbert on Executions*, p. 40, it is said, ‘*elegit* does not lie of the glebe belonging to the parsonage or vicarage, nor to the church-yard; for these are *solum Deo consecratum*;’ and for this is cited, *Jenk. Rep.* 207, where the same doctrine is laid down; and also, that no *capias* or *fieri facias* can issue against a clerk, if it appears that he has no lay fee, but only a *levari facias* to the Bishop. *Jenkins* refers to two cases from the *Year-books*: viz., 29 *Edw.* 3, c. 44, and 21 *Edw.* 4, c. 45. We have therefore complete authority for saying that, at Common Law, no process ever issued to a Sheriff to levy on ecclesiastical property the debt due in an action; and *Gilbert* is well warranted in saying that no *elegit* lies. *Sir W. Blackstone*, in the 3rd. vol. of the *Commentaries*, p. 418, gives an account of a writ of seques-

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tration to the Bishop of the diocese, which he says is in the nature of a *levare* or *fieri facias*, to levy the debt and damages, *de bonis ecclesiasticis*, which are not to be touched by lay hands. The same account is given of the writ in *Burn's Ec. Law*, tit. *Sequestration.*"

The law as laid down by Lord Alvanley has not, that I am aware of, ever been questioned; and I believe it will be found on inquiry that not a single instance can be shown in England or in Ireland, since the passing of the Statute of Westminster or the Statute of Frauds, in which it has been attempted to extend the ecclesiastical property of a rector or vicar under an elegit.

In *Eagle on Tithes*, vol. 1, p. 20, it is laid down that "tithes and other profits of ecclesiastical benefices are not extendible under an elegit." Other text-writers treat the matter as equally clear.

With respect to the terms used in the Statute of Frauds, viz., "lands, tenements, rectories, tithes, rents and hereditaments," the words "rectories and tithes" could not in that Act be meant to include ecclesiastical rectories and tithes, as a person could not, I apprehend, be seized of such property in trust for another.

In the case of *Wise v. Beresford* (a), a question as to priority arose between Mary Newman, a judgment creditor of the Rev. William Beresford, whose judgment was recovered in 1831, and the plaintiff, whose deed of annuity charging the glebe land and tithes of Innacorra, to which the Rev. William Beresford was entitled as rector, bore date the 15th of May 1835. A sequestration issued on the judgment in 1841. Sir E. Sugden, in giving judgment (p. 286), said:—"The question which I am now considering is, what is the operation of a judgment prior to the deed thus conveying the property, but upon which a sequestration has not been obtained until subsequently? *It has been clearly shown not to be a case within the Statute of Westminster.* It is also clear that the plaintiff *cannot have execution at Common Law.* He must first have recourse to the Bishop, and by this mode obtain a sequestration. The creditor gets a process, no doubt, but it is a process not at Common Law, or by reason of an actual, direct charge, but indirectly, by the aid of the Ecclesiastical Court. The

(a) 3 Dr. & War. 276.

sequestrator is accountable to the Bishop ; he is a mere bailiff ; he cannot maintain an action. He cannot bring an ejectment like a judgment\* creditor : he is nothing more than a mere bailiff or agent. The judgment undoubtedly enables the creditor to obtain a sequestration ; but I cannot see how it is made out that a judgment, *qua* judgment, gives such a lien on a benefice, or creates such a charge, as will entitle the creditor to rank in priority over other debts. In my opinion it does not. But as the question is a legal one, if the defendant (Mary Newman) desires it, I will direct a case for the opinion of a Court of Law."

I argued that case for the judgment creditor, Mary Newman, and it appears from the report that I declined to take a case for the opinion of a Court of Law.

That case was decided in January 1843, and it was not suggested that the Statute of Frauds contained any legislative declaration that, under the Statute of Westminster, ecclesiastical rectories and tithes were subject to an elegit. If an ecclesiastical rectory and tithes were extended under an elegit, no provision could be made that out of the revenues of the church the duties of the church should be provided for.

The observations of Judges Parke and Littledale in *Cottle v. Warrington* (*a*), during the argument, show that they considered that a judgment, *qua* judgment, did not affect an ecclesiastical benefice.

In *Sterling v. Wynne* (*b*), Chief Baron Joy laid down that "it is established that a judgment does not bind ecclesiastical property. An ecclesiastical benefice is only bound by the sequestration."

I believe it will be found that there never has been any instance in England or Ireland of a Sheriff returning to a writ of elegit that he had extended tithes or other ecclesiastical property ; nor has a writ of elegit, so far as I have been able to ascertain, been ever directed to a Bishop.

Under those circumstances there would be no difficulty on the question, were it not for the recent decision of Lord Cranworth in

(*a*) 5 B. & Ad. 447.

(*b*) 1 Jones, 63.

\* *Quare Elegit?*

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*Rolls.*

LYMBERRY

v.

HELSHAM.

*Judgment.*

1852.

Rolls.

LYMBERRY

v.

HELSHAM.

Judgment.

*Hawkins v. Gathercole* (*a*), which is the case mainly relied on by the petitioner. In that case a judgment was entered up in 1845 against the defendant Gathercole, a beneficed clergyman, upon a warrant of attorney executed by him to the plaintiff, and the judgment was duly registered. A bill was filed by the plaintiff against the defendant Gathercole and against the Bishop of the diocese, and against certain judgment creditors whose judgments were subsequent to the plaintiff's, but who had issued sequestrations against the benefice. The bill prayed, amongst other things, for a declaration that the plaintiff's judgment became and was a charge upon the defendant Gathercole's vicarage, tithes, rents, hereditaments and premises, against the defendants; and that the Bishop and the judgment creditors might be restrained from executing the sequestrations obtained by the latter, and that a receiver of the rents, tithes and rentcharges, belonging to the vicarage, might be appointed. A motion having been made for the receiver and injunction, an order was made by Lord Cranworth as prayed.

The question turned upon the construction to be put on the 13th section of the 1 & 2 Vic. c. 110, s. 13. By that section it is enacted "That a judgment already entered up, or to be hereafter entered up against any person in any of her Majesty's Superior Courts at Westminster shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents and hereditaments (including lands and hereditaments of copyhold or ordinary tenure), of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seized, possessed or entitled, for any estate or interest whatever at law or in equity, &c., &c.; and that every such judgment creditor shall have such and the same remedies in a Court of Equity against the hereditaments so charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had, by writing under his hand, agreed to charge the same with the amount of such judgment debt and interest thereon;" and then follows a proviso which had no bearing on the question. It was contended in that case, on

(*a*) 1 Sim. N. S. 63.

the part of the plaintiffs, that the 13th section of the 1 & 2 *Vic.* c. 110 made the judgment a charge in equity on the defendant's living, for the section contained the words "rectories and tithes," and therefore it was manifest that the Legislature intended to place judgments against ecclesiastical persons on the same footing as judgments against laymen. On the part of the defendant it was contended that by the Act of the 13 *Eliz.* c. 20, a clergyman in England had no power to charge his benefice, and that there was no ground for contending that the use of the words "rectories and tithes" could be held to repeal by implication the statute of *Eliz.* Lord Cranworth however, in giving judgment, said:—"Prior to the statute (1 & 2 *Vic.* c. 110), it is said it was made unlawful by the statute of *Eliz.* for the owner of a living to charge it; and that it could not have been within the contemplation of this statute to authorise a party who was incompetent, before the statute passed, to charge his living, to charge that which previously he was incompetent to charge, because it was said it was quite out of the scope of the statute. I entirely accede to that argument, if the meaning of it is that it did not authorise him to charge it in the ordinary sense of creating a charge by deed or contract; but I do not accede to it at all if it is meant to be contended that he cannot charge it, or rather that the law will not charge it for him, when that is done which the law says shall give to the party the effect of a charge. What right have I to speculate on what the Legislature meant, when it is as clear as words can make it? But if I did speculate, I should not in the least doubt (whether this case was within the contemplation of the Legislature I know not), that the object was to make all property, that by any process of execution could be made available to satisfy creditors, available to them by creating a charge upon it, the benefit of which they were to obtain in the ordinary way in which property charged can be made available. That is the short point, and I have not a word more to say than that I think the plaintiff is entitled to a receiver."

The 3 & 4 *Vic.* c. 106, s. 22 (the Act in force in Ireland), contains provisions similar to the 1 & 2 *Vic.* c. 110, s. 13.

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—  
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In the case of *Johnson v. Holdsworth* (*a*), Lord Cranworth said:—"By section 11 (1 & 2 Vic. c. 110, which corresponds with the 3 & 4 Vic. c. 105, s. 19,) it is enacted that it shall be lawful for the Sheriff, to whom an elegit shall be directed, to deliver execution of all the debtor's lands, as before the Act he might of a moiety; but there is no power to the judgment creditor to obtain an elegit on any judgment on which he could not have obtained it before." And his Lordship, in another part of the judgment, states:—"My opinion is that the 13th section, notwithstanding the generality of its language, must be read as applying only to judgments legally perfected, so as to affect the lands of a debtor, and on which the creditor might sue out an elegit."

It has been contended in this case by the petitioner that Lord Cranworth thus construes the 11th and 13th sections of the English Act together, which correspond with the 19th and 22nd sections of the Act in force in Ireland (3 & 4 Vic. c. 105); and that as his Lordship has decided in *Hawkins v. Gathercole* that the words "rectories and tithes" in the 13th section include ecclesiastical "rectories and tithes," the same words in the 11th section of the English Act, and the 19th section of the Act in force in Ireland, must have the same construction, and that it would be contrary to an established rule of construction of Acts of Parliament to construe the same words differently in different sections of the same statute. That argument might, however, be used against the decision in *Hawkins v. Gathercole*; but upon that decision I offer no opinion. Whatever may be the construction of the 13th section of the 1 & 2 Vic., and of the corresponding enactment in the 22nd section of the 3 & 4 Vic. c. 105, I am of opinion, upon the authority of the several cases and authorities to which I have referred, that ecclesiastical tithes, &c., cannot be taken in execution under an elegit, and consequently that a receiver cannot be appointed or extended under the 21st section of that Act.

It is right to observe that if a bill or cause petition was filed in this country under circumstances similar to those in *Hawkins v. Gathercole*, the question would be different, as Sir E. Sugden has

(a) 1 Sim. N. S. 110.

decided in *Wise v. Beresford* (*a*), that a charge upon a benefice for the life of an incumbent was not prohibited by the Statute Law of Ireland; and consequently the argument raised by the defendant's Counsel in the case of *Hawkins v. Gathercole* would not be applicable in this country. I, however, offer no opinion on that question.

Another question was raised by the petitioner's Counsel in this case—namely, that even supposing a receiver could not be appointed under the terms of the first part of the 21st section of the 3 & 4 *Vic.* c. 105, on the ground that ecclesiastical tithes could not be extended under an elegit, yet that under the latter part of that section, to which I have referred, the Court is bound to grant the application.

By that part of the section it is enacted, that in proceeding under the 5 & 6 *W.* 4, c. 55, and under said Act of the 3 & 4 *Vic.* c. 105, the Court of Chancery shall have power to "appoint or extend a receiver in a summary way on a petition at the instance of such person, over any property of such judgment debtor, which such creditor would or could make available for the payment of his judgment debt by filing (after a writ of execution had been sued and returned at law upon such judgment) a bill in a Court of Equity, or by any writ of execution at law, or (subject to the proviso hereinafter contained) by petition under the provisions of this Act."

The terms "such person" and "such creditor" refer to the previous part of the section, *i. e.*, a person entitled to sue out, or who has already sued out, a writ of elegit upon any judgment; and therefore the cases and authorities to which I have already referred are equally applicable to this part of the section. That enactment was, I apprehend, intended to apply to such cases as are adverted to by Lord Cottenham in *Neate v. The Duke of Marlborough* (*b*). His Lordship there stated:—"The Act of Parliament (the Statute of Westminster) gives him (the plaintiff), if he pleases, an option by the writ of elegit, the very name implying that it is an option, which, if he exercise, he is entitled to have a writ directed to the Sheriff to put him into possession of a moiety of the lands. The

(*a*) 3 Dr. & War. 276.

(*b*) 3 M. & Cr. 415.

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effect of proceeding under the writ is to give to the creditor a legal title, which, if no impediment prevent him, he may enforce at law by ejectment. If there be a legal impediment, he then comes into this Court not to obtain a greater benefit than the law, i. e., the Act of Parliament, has given him, but to have the same benefit by the process of this Court which he would have had at law if no legal impediment had intervened."

A difference of opinion had arisen between the Court of Chancery and the Court of Equity Exchequer, as to the construction of the 5 & 6 W. 4, c. 55; the Court of Chancery holding that it had jurisdiction to appoint a receiver over an equity of redemption, where the mortgagee was not in possession: *Smith v. Egan* (a); the Court of Exchequer holding otherwise: *Hanley v. Lord Langford* (b). Other cases also were decided in the Courts of Chancery and Exchequer upon the same principle, and will be found collected in Mr. *Hamilton Smythe's* work on the 3 & 4 Vic. c. 105, p. 80, and Mr. *Reilly's* work on *Receivers*, p. 72.

It appears to me that the part of the 21st section to which I have last referred was introduced to settle the law on the subject, but not to entitle a party to appoint a receiver upon a summary petition under the Act, where the charge was merely equitable, and where the property could not be extended under an elegit, although no legal impediment existed.

It is difficult to understand the words "or by any writ of execution at law," in the part of the 21st section of the 3 & 4 of the Queen to which I have last adverted. I, however, think that those words do not include a writ to the Bishop, which is not to be considered, according to the judgment of Sir E. Sugden in *Wise v. Beresford*, to which I have referred, an execution at Common Law.

It may be that in a case like the present, a bill or cause petition under the Court of Chancery Regulation Act might be filed and the receiver extended, but that is entirely a different question. If such a proceeding is taken, the Court could make such an order as was made in *Wise v. Beresford*, so as to secure the due performance of

(a) *Sau. & Sc.* 238.

(b) *3 Jones*, 346.

divine service, and the other matters connected with the duties of the clergyman. No instance can, I believe, be found in which an order was made to appoint or extend a receiver over tithes, in a summary proceeding under the 5 & 6 W. 4, and 3 & 4 Vic.

In this case no inconvenience would arise, as an order has been made in the cause, for the purpose of providing for the performance of the duties of the church; but I apprehend I have no right to extend a receiver, unless I could make an order in the matter to appoint a receiver, if none had been already appointed.

Upon the whole, I am of opinion that I must make no rule.

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## TAYLOR v. YOUNG.

(Chancery.)

Dec. 18.

Where a cause petition stated a mortgage of lands in 1815, for the sum of £600, containing a covenant by the mortgagor to insure his life for the same sum, and to assign the policy to the mortgagee as a further security for the mortgage debt; and also stated a deed of assignment, in 1845, of the equity of redemption in the lands, upon certain trusts unknown to the petitioner (the assignee of the mortgage), save that he believed that the trustees were empowered to apply the rents in payment of premiums on certain policies of insurance on the life of the

From the cause petition in this case the following facts appeared. Francis Smyth Young, being seised, under a lease for three lives, with a covenant for perpetual renewal, of the lands of Lissanimore, in the county of Cavan, by indenture of the 20th of January 1815 mortgaged them to Robert Clarke for the sum of £600, which was to bear interest at the rate of £6 per cent. per annum. The same deed contained a covenant by the mortgagor to insure his life in the sum of £600, and to assign the policy to the mortgagee, his executors, administrators and assigns, as a further security for the sum advanced.

Robert Clarke died in 1819, and appointed his only son and heir-at-law, Robert Clarke, jun., his executor, who, by deed of the 21st of September 1820, assigned the mortgage debt and the mortgaged lands and premises, with the appurtenances, to James Harold Walker.

James Harold Walker, by deed of the 17th of March 1827, reciting that he and one Powell were indebted by their joint and several bond to R. C. Walker and John Taylor the petitioner in the sum of £2400, for the further securing that sum, assigned the mortgage debt of £600, and interest thereon due, and the mortgaged lands and premises, to R. C. Walker, and the petitioner, by way of mortgage, to secure the sum of £2400 and interest.

A moiety of the sum of £2400 was the property of Mary mortgagor as a further security for the mortgage debt; and prayed the usual accounts on foot of the mortgage, a foreclosure, a sale of the lands, and that the petitioner might be declared entitled to such of the policies mentioned in the deed of 1845 as should appear to have been effected as a further security for the mortgage debt:—

*Held*, that notwithstanding the prayer for relief in respect of the policies, the Court had power, under the 15th section of the Court of Chancery Regulation Act, to make a summary order of reference upon the petition.

*Held also*, that, where such an order has been made, the Master has authority to deal with all objections to the petition on the ground of multifariousness, or of the absence of proper parties.

Walker, wife of J. H. Walker, and the £600 mortgage debt and mortgaged lands and premises were by the foregoing indenture assigned to R. C. Walker and the petitioner, in trust for her and her issue.

R. C. Walker died in 1850. The £2400 debt had not been fully paid, and a sum remained due on foot thereof exceeding the principal and interest due in respect of the £600 mortgage.

The petition next stated that by indenture of the 23rd of February 1821, Francis Smyth Young assigned the equity of redemption in the mortgaged lands and premises to J. H. Walker and William Tilly, upon certain trusts unknown to the petitioner. That Tilly had since died, and that J. H. Walker had in 1838 gone to America, where he was still residing. That in April 1839 Francis Smyth Young, or his agent, paid £14. 15s. on account of interest on the mortgage of £600 to Mary Walker, and that no further or other sum had been since paid on foot of that mortgage, and that the principal, and interest since that time, remained due.

That by indenture of the 19th of June 1845, Francis Smyth Young conveyed his equity of redemption in the mortgaged lands and premises to Joseph Dickson, upon certain trusts, with the particulars of which the petitioner was unacquainted, save that he believed that Joseph Dickson was thereby empowered to apply the rents and profits of the lands and premises in payment of the premiums necessary for keeping up certain policies of insurance on the life of Francis Smyth Young, effected by him or J. H. Walker, as a further security for the mortgage debt of £600, which policies the petitioner believed had been so kept up, and to the benefit of which he claimed to be entitled.

The petition prayed that Francis Smyth Young, and Joseph Dickson, and J. H. Walker, on his coming within the jurisdiction, should show cause why the petitioner should not have relief, and prayed a reference to the Master to take the usual account on foot of the mortgage, and a foreclosure, and sale of the lands, an account of incumbrances, &c., and that the petitioner might be declared entitled to such of the policies of insurance mentioned in the trust deed of the 19th of June 1845 as should appear to have been

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effected as a further security for the mortgage debt of £600.

Upon the 1st of February 1851, the LORD CHANCELLOR made upon the petition the usual summary order of reference to the Master under the 15th section of the Court of Chancery Regulation Act.

Argument.

**Mr. F. Fitzgerald** (with whom was **Mr. Leech**), on behalf of the respondent Joseph Dickson, now moved, pursuant to a notice bearing date the 2nd of December 1851, that the summary order obtained in this case on the 1st of February 1851, and all proceedings thereunder, should be set aside, with costs, and for the costs of the motion, and all costs incurred by Joseph Dickson in the matter in consequence of the order of the 1st of February 1851. They contended that the Court ought not to have made that order, inasmuch as the petition did not fall within the 15th section of the Court of Chancery Regulation Act, or the 19th General Order of the 31st July 1851, because it prayed relief in respect of the policies of insurance mentioned in the trust deed of June 1845; and they insisted that the *ceux qui trahent* of that deed ought to have been made respondents to the petition; and also that the petition, inasmuch as it prayed a foreclosure of the mortgage, and sale of the lands, and also relief in respect of the policies of insurance, was multifarious; and that accordingly the Court would not make a summary order upon a plainly unsustainable petition: *Cuming v. Taylor* (a); and moreover that the trusts of the deed of June 1845 could not be partially carried out as prayed by the petition.

**Mr. Brewster** and **Mr. Warren**, for the petitioners.

The only question for the Court now to determine is, whether or not it had jurisdiction under the 15th section of the Court of Chancery Regulation Act to make the summary order of the 1st of February 1851. There cannot be any doubt that the case falls within that section. It expressly comprises petitions presented with respect to foreclosure of mortgages. This is merely such a petition, its sole object being to realise the amount of the mortgage debt, secured, it is true, upon two classes of property, lands and policies of insurance,

(a) 1 Ir. Ch. Rep. 25.

all however included within a single contract, viz., the mortgage. At all events this objection as to multifariousness, as well as all the other objections, may be taken before the Master. It is evident that the respondent Joseph Dickson, as trustee of the deed of June 1845, took from the settlor Francis Smyth Young (the mortgagor) the mortgaged premises subject to all the equities and rights to which they were liable in the hands of Young, and amongst those was the mortgage of 1815.

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*Argument.*

#### The LORD CHANCELLOR.

The objections taken here to the species of relief sought by the petition, and to the absence of parties, are all matter for the consideration of the Master; he is competent to deal with all such questions, and with the question of multifariousness.

*Judgment.*

The only point which I have to consider is, whether or not the case falls within the 15th section of the Court of Chancery Regulation Act. That section empowers the Court summarily to refer to the Master cause petitions presented with respect to the foreclosure and redemption of mortgages. Petitions for foreclosure are in fact petitions for restitution of the monies lent on mortgages. What is it that the petitioner calls upon the Court to do? He prays the usual accounts on foot of the mortgage, and a foreclosure, a sale of the lands, an account of incumbrances thereupon, and that he may be declared entitled to such of the policies of insurance mentioned in the trust deed of the 19th of June 1845 as should appear to have been effected as a further security for the mortgage debt of £600. I do not understand this petition as praying an execution of the trusts of that deed of 1845, or as involving any necessity for such relief. The original mortgage deed of 1815 contained a covenant by the mortgagor to insure his life in the sum of £600, and to assign the policy to the mortgagee as a further security for the sum advanced. This case is not like that of a mortgage, and the confession of a judgment, which latter is a separate security; but it is an agreement that the mortgagee shall have for his pledge the lands of Whiteacre, and a policy of insurance upon the life of the mortgagor. The policy appears to me to constitute a part of the security. If the

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mortgagor had effected the policy the day after the date of the deed of 1815, the case would be very simple indeed. If this were effected by way of further security for the mortgage money, it still falls literally within the provisions of the 15th section of the Act. Whether the property mortgaged be one thousand acres of land, or a policy of insurance, the transaction is equally a mortgage. This is, as I have said, quite different from the case of a collateral judgment, with reference to which the General Order has been made. This policy is a part and parcel of the pledge, and therefore falls literally and properly within the scope of the 15th section. I do not appreciate the motives of this respondent in coming here. The whole affair might ere this time have been settled in the Master's office. I must refuse this motion, with costs.

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In re CHARLES JENNINGS, a Bankrupt,  
Ex parte THE BELFAST AND COUNTY DOWN  
RAILWAY COMPANY.

July 12.

Held, in affir-  
mance of the  
decision of the  
Commissioner of  
Bank-  
rupts, *supra*,  
p. 236, that a

Railway Com-  
pany, proving  
against the  
estate of a  
bankrupt for

*Mr. Fitzgibbon* and *Mr. Hamilton Smythe*, for the appellants,  
the Belfast and County Down Railway Company, cited *The London*

calls, must deduct the price or value of the shares from the amount of their claim,

or give up the shares for the benefit of the creditors of the bankrupt.

*Held also*, in reversal of the decision *supra*, p. 236, that Railway calls payable by instalments may be enforced.

*Held also*, that the day appointed for payment of the last instalment may be deemed the day upon which the call is payable, and that twenty-one days' notice previous thereto is a valid notice within the 22nd section of the Companies Clauses Consolidation Act.

*Sembler*.—The non-subscription of the prescribed capital is not a good defence to an action for calls.

*and North Western Railway Company v. M'Michael (a); The Birkenhead, Lancashire and Cheshire Railway Company v. Webster (b); The Ambergate Railway Company v. Norcliffe (c); The Waterford, Wexford, Wicklow and Dublin Company v. Dalbiac (d); Great Northern Railway v. Kennedy (e).*

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Argument.

Mr. *Francis A. Fitzgerald* and Mr. *M'Blaine*, for the respondent, the assignee, cited *The Wicklow and Waterford Company v. Logan (f)*; *Pitchford v. Davis (g)*; *Walstab v. Spottiswoode (h)*; *Cohen v. Wilkinson (i)*; *The Norwich, &c., Railway Company v. Theobald (k)*; *Ex parte Connell(l)*; *Blakemore v. Glamorganshire Canal Company (m)*.

#### The LORD CHANCELLOR.

This case comes before me on appeal from the decision of his Honour Mr. Commissioner Macan, which is reported, 1 *Irish Chancery Reports*, p. 236.

*Judgment.*

I agree with his Honour in thinking that the Company must deduct the value of the shares from the amount of the claim which they seek to prove against the estate of the bankrupt, or must give up the shares for the benefit of the creditors. The Company may sell the shares, and prove for the amount of the balance between the sum realised and the full amount of their claim, if the balance be less than that amount. The Commissioner offers to allow the Company to do that. Their debt is the sum due to them for calls *minus* the value of the shares. I cannot distinguish the case in this respect from that of a mortgagee, who may sue his debtor and hold his security, but, if the debtor become bankrupt, cannot both proceed to prove the debt against the estate of the bankrupt, and nevertheless

(a) 20 Law Jour. N. S. Exch. 227.

(b) Ibid, 234.

(c) Ibid, 234.

(d) 20 Law Jour. N. S. Exch. 227.

(e) 6 Rail. Cas. 5.

(f) 19 Law Jour. N. S., Q. B. 259; S. C. 14 Jurist, 347.

(g) 5 M. & W. 2.

(h) 15 M. & W. 501.

(i) 12 Beav. 125; S. C. 1 Mac. & Gor. 481. (k) 1 Moo. & M. 151.

(l) 3 Deacon, 201.

(m) 1 M. & K. 154.

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*a Bankrupt.*

still hold his security. It appears to me that the result of all the transactions is to place the Company in the same position as they would have been if they declared the shares forfeited. The Company has a statutory lien upon the shares, and the assignee of the bankrupt may not think it advisable to redeem the shares. The plain justice of the case is therefore, I think, to regard the Company as in the character of mortgagees. It may happen that the shares may turn out to be worth fifteen shillings in the pound, and that the estate of the bankrupt may produce a dividend exceeding five shillings in the pound.

With regard to the other points of the case, I must say that the calls made payable by instalments are valid. That question has been set at rest by the decisions which have been published since this case was before the learned Commissioner: I allude to the decisions by the Court of Exchequer in England, in *The London and North Western Railway Company v. M'Michael* (a), and *The Birkenhead, Lancashire and Cheshire Railway Company v. Webster* (b); and again, by the Court of Exchequer Chamber, in *The Ambergate Railway Company v. Norcliffe* (c); in all of which cases it has been held that calls so made payable are valid. And I think that the notice required by the 22nd section of the Companies Clauses Consolidation Act has been given here, and that the day appointed for the payment of the call may be considered the day appointed by the Company for the payment of the last instalment. In respect to these points, I must therefore vary the order made by his Honour.

With regard to the objection that the prescribed amount of capital has not been subscribed, I think that it should have been made by way of exception, and that it is now too late to adopt that course, for the time has expired; and I may add that in *The Waterford, Wexford, Wicklow and Dublin Railway Company v. Dalbiac* (d), on the 22nd section of that Company's Act, it was held that the raising of the capital was not a condition precedent to the power of the Company to make calls, but only to their exer-

(a) 20 Law Jour. N. S. Ex. 227.

(b) Ibid, 234.

(c) Ibid, 234.

(d) Ibid, 227.

cising the compulsory power of taking lands, &c. The order of his Honour must be varied so far as to allow the petitioners to prove on the estate of the bankrupt for the third, fourth, fifth and sixth calls; and the assignee is entitled to his costs of appearing on this petition, out of the estate.

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*Bankruptcy Order Book*, fol. 169.

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Nov. 15, 29.

A petition of appeal from the order made in this case by his Honour the Master of the Rolls, having been presented to the LORD CHANCELLOR, Counsel for the petitioners now moved that his Honour's order should be reversed.

The decision in this case, reported *supra*, p. 401, varied on appeal.

The decision of his Honour is reported 1 *Irish Chancery Reports*, p. 401. It should be stated that the finding of the jury at the inquisition there mentioned, and which was held upon the commission

A demise of lands and the tithes thereof does not necessarily mean a demise of lands and a demise of tithes as

separate and independent properties, but may, if the circumstances of the case warrant such an interpretation, be construed to mean a demise of lands tithe free.

The 20th section of the statute 1 & 2 Vic. c. 109, enacting that the provisions thereinbefore contained, "with respect to the establishment of exemption, &c., from tithes, shall not extend to any case where the tithes of any land shall have been demised by deed for any term of life or years, or where any composition for tithes shall have been made by deed or writing, by the person entitled to such tithes, with the owner or occupier of the land, for any such term for life or years, and such demise or composition shall be subsisting at the time of the passing of the Act, nor to any suit for establishing a claim to tithes then pending," means that the exempting clauses of the statute are not applicable to the case of the owner of tithes demising them to the owner or occupier of the land chargeable with those tithes; but a person actually entitled to the common ownership both of lands and the tithes thereof is not, merely because he has derived his title under a lease making separate demises of each, disentitled by that section to hold the lands tithe free.

Where petitioners under the statute 1 & 2 Vic. c. 109, s. 16, praying that Whiteacre should be declared tithe free, alleged that those lands had constituted part of the possessions of the monastery of D. and were held by the Friars and Abbots free from tithes; and that under a commission issued in the 18 Eliz. an inquisition was held, and the jury found that one hundred and fifty acres of land in Whiteacre, with the tithes of the same, formed parcel of the possessions of the monastery of D., and had been concealed from the Queen and her progenitors; and the petitioners also alleged that by letters patent in the 19 Eliz., one hundred and fifty acres of land in Whiteacre, and the tithes of the same, were granted to W, under whom the petitioners alleged that they derived by lease made in the year 1700, demising Whiteacre and the tithes thereof for three lives, with a covenant for perpetual renewal; and stated a composition made in 1833, and a certificate of the Commissioner

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issued in the 18th year of the reign of Queen Elizabeth, was as follows:—"The jurors upon their oaths declare that one hundred and fifty acres arable and pasture in Ballyvoile *and Ballinevogy*, with the tithes and other spiritualities of the same, of the annual value of thirteen shillings and four pence, are parcel of the possessions of the late house or abbey of Dunbrody, and were concealed and subtracted from the aforesaid Lady the Queen and her progenitors, and were occupied by Maurice Fitzgerald during his life, and thereafter by Sir James Fitzgerald, Knight; in faith and testimony whereof," &c.

It should also be mentioned that the Duke of Devonshire, in his discharge filed in the Master's office, stated that the townland of Ballyvoile contained about five hundred and ten acres statute measure, and that the townland of Ballinevogy contained about six hundred and fifteen similar acres; and that when under the statute 2 & 3 W. 4, c. 119, the commissioner appointed for fixing the tithe composition of the parish of Kilrossanty, in which Ballinevogy is situated, was making his applotment, he excepted from it seventy-five acres Irish plantation measure of that townland; and that following his example, the commissioner, subsequently appointed for the adjoining parish of Stradbally, in which Ballyvoile is situate, in making his applotment excepted from it seventy-five acres Irish plantation measure of that townland; and the Duke contended

certifying the composition of the parish in which Whiteacre was situate (of which £47 was assessed on Whiteacre), and also certifying that it was payable to the respondent; and the petitioners also alleged that for sixty years anterior to the composition, Whiteacre was held by the owner and the tenants thereof tithe free. The respondent denied that Whiteacre was part of the possessions of the monastery, and insisted that even admitting the statement of the petitioners as to the one hundred and fifty acres to be true, it only led to the conclusion that to that extent alone were the lands of Whiteacre tithe free. The Court referred it to the Master to inquire whether Whiteacre was rightly charged with tithe composition if the statute 1 & 2 Vic. c. 109 had not passed, or if such composition had not been suspended. Evidence was entered into on both sides and tendered to the Master, who declined to consider it, and inasmuch as it appeared on the petition and the charge that the lands and tithes were separately demised by the lease of 1700, he found that Whiteacre would have been rightfully charged with tithe composition if the statute 1 & 2 Vic. c. 109 had not been made, or if such composition had not been suspended. The Court (being of opinion that the lease of 1700 was susceptible of being construed to mean a demise of Whiteacre tithe free, and inasmuch as the respondent had not in his discharge rested his defence upon the view adopted by the Master, but had denied the title of W, the lessor of the petitioners) directed the Master to review his report, but ordered that notice of all further proceedings should be given to the person entitled to the reversion on the lease of 1700, who had not previously been made a party in the matter.

that the remaining three hundred and eighty-six statute acres of Ballyvoile were rightly apploated by the commissioner, with the tithe.

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Mr. Serjeant *Christian* and Mr. *Harris* were heard in support of the appeal.

*Argument.*

Mr. *Napier* and Mr. *Joshua Clarke* were heard in support of the order of the Master of the Rolls.

In the progress of the argument the cases of *Salkeld v. Johnston* (a), *Fellows v. Clay* (b), *Chambers v. The Earl of Shannon* (c) and *Eagle on Tithes*, p. 26, were referred to.

#### The LORD CHANCELLOR.

Although not now intending finally to dispose of this case, I may say that I should have considerable difficulty in arriving at the same conclusion as the Master seems to have done in his report. It may be that as to the three hundred and eighty-six acres the petitioners have not fully deduced title to the exemption from tithe. But the Master does not seem to have investigated the case by examining into the evidence tendered. He appears to have grounded his report solely upon the petitioners' statement of their case, and especially of the lease of 1700, which he considered as showing that the tithes and lands were distinct subjects of demise. But as to the seventy-five acres, half of the one hundred and fifty acres in Ballyvoile and Ballynevogy which were found by the inquisition taken in the 18 *Eliz.* to have been part of the monastic possessions of the abbey, of Dunbrody, and which it is now admitted were tithe free, it is impossible to say that the tithes were the distinct and separate subject of demise. The view taken by the Master would appear to involve the proposition that there is but one possible construction of a demise of lands and tithes, viz., that it is an independent demise of each; but it appears to me that such a lease would not be an un-

*Judgment.*

(a) 1 Mac. & Gor. 242; S. C. 1 Hare, 196; 2 C. B. 749; 18 L. J. Exch. 89.

(b) 4 Q. B. 313.

(c) 5 Ir. Eq. Rep. 335.

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natural mode of demising lands tithe free. I shall consider the case and mention it again.

## The LORD CHANCELLOR.

This case comes before me under very peculiar circumstances. The original petition was framed under the provisions of the 16th section of the statute 1 & 2 Vic. c. 109, and prayed for an order allowing the exemption of the lands of Ballyvoile from tithe rentcharge, and that the certificate and applotment of the tithe composition might in this respect be amended. The petitioners state the right to these lands to have originally been in Sir Nicholas Walsh, under letters patent of the 8th of March, 19 Eliz.; whereby one hundred and fifty acres of land, arable and pasture, lying and being in Ballyvoile, and the tithes of the same, described as parcel of the possessions of the late ~~monastery~~ of Dunbrody, were granted in trust for him to George Moore. The petitioners state also a lease by Robert Walsh, the grandson of Sir Nicholas Walsh, bearing date the 13th of May 1700, demising to William Power the elder the town and lands of Ballyvoile, therein described, as containing by common estimation one ploughland; &c., together with all the tithes great and small, and other ditties and rights to said tithes belonging, for three lives; with a covenant for perpetual renewal; that all the estate of the lessee became vested in his grandson William Power the younger, who, on the 24th of February 1781, conveyed to Robert Snow and his heirs the said town and lands of Ballyvoile, with the tithes thereof, for the lives in the original lease, and in a renewal thereof bearing date on the 24th of September 1726, and the lives to be named in every future renewal. The petitioners thence trace title under the lease of 1700 to themselves, and state the reversion to be in Charles Edward Kennedy, who is not a party to these proceedings, and has not received any notice thereof. Those lands of Ballyvoile the petitioners seek to hold exempt from tithes, as being originally a portion of lands held by the dissolved monastery of Dunbrody in the County of Wexford, and as such, within the statute 33 Hen. 8, sess. 2, c. 5 (Ir.); and it is further

alleged on behalf of the petitioners, that there has not been any claim made for tithe in respect of those lands within the period fixed by the statute 1 & 2 *Vic.* c. 109. If the case rested there, it is clear that an exemption is established, and the Court would not, nor could, refuse to comply with the prayer of the petition.

By the Tithe Composition Act, a certain portion of the tithes in parishes of which his Grace the Duke of Devonshire is lay impropriator was given to him, and a portion was given to the vicar. Among the rest the tithes of the lands of Ballyvoile were allotted to his Grace, with the exception of seventy-five acres which it is conceded were not titheable.

As I have already stated, the case made by the petitioners is that the lands in question were exempt from tithes; that Sir Nicholas Walsh so held them, and so demised them, and that tithes have not been paid in respect of the lands within the statutable period fixed by the statute 1 & 2 *Vic.* c. 109.

To a charge founded on this petition, the Duke of Devonshire has filed a discharge, and his case is that he is rector; he admits the dissolution of the monastery of Dunbrody, but he denies that the lands of Ballyvoile formed part of the possessions of the monastery; and insisted that, even if the statement in the charge were true, it only led to the conclusion that one hundred and fifty acres of the lands of Ballyvoile were so held.

This case came before the late Master of the Rolls in the year 1843, who made an order referring it to the Master to inquire whether the lands of Ballyvoile in the petition mentioned were rightly charged with tithe composition, if the statute 1 & 2 *Vic.* c. 109, had not passed, or if such composition had not been suspended. The parties then went into the Master's office, and up to that period treated the issue I have stated as including the question which was to be tried between them: and if that had not been the issue, the order of 1843 could not have been made. Both parties concur in saying that the delay which has taken place was caused by their desire to await the final decision of *Salkeld v. Johnston* (a). That case was decided by Lord Cottenham in 1849; he held that the effect of the similar section of the English Act 2 & 3 *W.* 4,

(a) 1 M'Naghten & Gordon, 242.

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c. 100, was to establish the exemption where there was not any proof of payment within the period specified by the statute, although without proof of any particular ground of exemption. The decree in that cause having been made, the parties to the present petition proceeded to consider the case put forward by the Duke of Devonshire; and if the petitioners had to sustain their case by primary proofs of actual possession of those lands, with an original exemption from tithe, as being lands of a dissolved monastery, they have not been successful, there being no evidence of any grant of the lands of a dissolved monastery to Sir Nicholas Walsh, except one hundred and fifty acres, part of which appear to be in Ballyvoile, and the residue in Ballynevogy. There is, therefore, so far as I can see, a failure of such proof on the part of the petitioners.

But evidence was gone into on both sides, and tendered to the Master, who it appears, however, did not think it was a case in which he was bound at all to consider the evidence tendered on either side. The Master was of opinion that, taking the petition and the charge together, this was not a case within the provisions of the statute, because it appeared that in the lease of 1700, and in the subsequent renewals, there was a grant of the lands, together with a grant, *nominatim*, of the tithes also, and that it was therefore plainly within the section of the statute which creates an exception in favour of cases where the tithes are demised to the occupier of the land. No doubt, if that were established, the case would be a clear one for holding that on this petition the relief sought could not be granted; but the advisers of the Duke of Devonshire never put forward such a case; he never alleged that Sir Nicholas Walsh had an ownership in the tithes, independent of his ownership in the lands; he asserts that from the beginning he himself had a right to the tithes as lay impropriator, and he denies the title of Sir Nicholas Walsh altogether. That is an issue very different from that which the Master has considered. His report is that, upon reading the charge of the petitioners, by which it appeared that they themselves set forth a title by which they claimed to be owners of the lands of Ballyvoile, and of the tithes both great and small thereof, and that they derived those lands, together with the tithes thereof, both great and small, under a lease for three lives, with

a covenant for perpetual renewal, he finds that the lands of Ballyvoile in the petition mentioned would have been rightfully charged with tithe composition if the statute 1 & 2 Vic. c. 109 had not been made, or if such composition had not been suspended. That is the view taken by the Master with respect to the title of Sir Nicholas Walsh, the lessor of the lease of 1700, and of those deriving the reversion under him—in other words, that Sir Nicholas Walsh having an ownership of lands, and an ownership of tithes, demised the lands and tithes by a lease put in issue by the petitioners, which lease showed the existence of the tithes as property separate from and independent of the lands; and he accordingly determined, on the case made by the petitioners themselves, that those lands had been rightfully charged with tithe composition under the statute.

Upon this part of the case it is important to consider the allegations in the charge and discharge filed by the parties, and especially to keep in mind that the lease of 1700 comprised the whole of the Abbey lands of Ballyvoile, including the seventy-five acres which, it is conceded, are exempt from tithes. In respect of these seventy-five acres, it is impossible to conclude that a grant of the tithes was made by the lease as of a separate property, independent of the land. Can it then be said that the lease of the residue of the lands is conclusively to be considered as made of the tithes as such separate property, when it is plain that the seventy-five acres are demised upon a different basis? The Master's opinion would seem to be, that there cannot be a lease of lands and tithes together, each being specially named, except where the lands and tithes are demised as subsisting properties, separate and independent of each other. But the grant from the Crown of the one hundred and fifty acres was a grant as well of the lands as of the tithes; and Sir Nicholas Walsh plainly took the lands exempt from tithes thereunder. Now supposing the case of the petitioners to be confined to the seventy-five acres in Ballyvoile, which form a portion of the one hundred and fifty acres, if the principle upon which the Master has acted be correct, the same rule must apply, although contrary to the facts of the case and the clear intention of the parties. The Duke of Devonshire making no such case as this—it would plainly be destructive of his own title to do so—says that he does not believe

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that any part of these lands ever belonged to the monastery of Dunbrody, except the one hundred and fifty acres, which it has been conceded in the argument of this case were granted exempt from tithes; and he says that, "assuming, but not admitting, that the Abbey of Dunbrody, or the Friars or Abbots thereof, was or were at one time seized of one hundred and fifty acres, late Irish plantation measure, in said lands of Ballyvoile and Ballynevogy, or of seventy-five acres late Irish plantation measure, in Ballyvoile, yet he denies that the said Abbey or the Friars or Abbots thereof ever had title to the whole of the lands of Ballyvoile, or to that portion of it, that is to say, the said three hundred and eighty-six statute acres thereof upon which the said tithe composition was so as aforesaid charged or apploated." His defence in effect amounts to this, viz.: that there was no title in the petitioner save that which he derived through Sir Nicholas Walsh, who had no title to the lands discharged from the tithes; and so the Duke denies the case made by the petition; he denies that the lands formed part of the possessions of the monastery of Dunbrody, and he traverses the allegations in the charge in the terms of the statute; he does not say that the right to the tithes has been merely suspended by the conjunction of the ownership of the land and the ownership of the tithe, but he says that tithe has been actually paid in respect of these lands.

The case is not raised by his Grace that the petitioners, by their own showing, hold under the circumstances contemplated in the 20th section of the statute 1 & 2 Vic. c. 109, as lessors of the tithes, from Sir Nicholas Walsh.—[His Lordship here read the section.]—The plain meaning of this section is, that the exempting clauses are not to apply to the case of the owner of the tithes, demising them to the owner or occupier of the land, but it does not disentitle a party who is actually entitled to the common ownership both of lands and tithes from making such a claim, merely because he has derived his title under a lease making separate demises of each.

All that has hitherto been done in the Master's office is so much waste of time and of expense, if the only possible construction of the grant relied on by the petitioners be that it is a grant of tithes by a lessor claiming them as a separate inheritance. The case on the part of the petitioners is wholly different; it is, in fact, an as-

sertion of the title of their lessor to hold the lands tithe free, and they rely on the lease in support of that position, as against the Duke of Devonshire. As to the form of the lease, it has but followed the language of the grant from the Crown giving the lands and the tithes. A similar form of grant will be found in *Strutt v. Baker* (a). No particular question seems to have been made there as to the form; the grant seems to have been taken to mean a grant of both lands and tithes, but does it follow thence that no other construction can be given to grants of this description, even though lands clearly exempt from tithe are dealt with by the same instrument in a similar manner? The allegations in the petition are that Sir Nicholas Walsh held the lands discharged from tithe, and leased the lands in the same way, and the petitioner rests on the title of the landlord not to hold the tithes in the sense implied by the decision of the Master, but to hold the lands so exempt; and the true construction of the lease may well be, not that it contains an assertion of an independent title to the tithes, but that it merely uses a particular mode of conveying the lands tithe free.

I think the case must be sent back to the office for re-consideration of the real questions involved in it.

If the objection had been taken at first, no doubt it would have been considered, but the parties never thought of it. It is not the duty of the Court to dispose of such a case summarily, in the way this case has been dealt with, where the intentions of the parties in their respective pleadings, as they may be called, were plainly very different from the view adopted by the Master.

The reversioner, however, should have notice of all further proceedings in this matter. There are cases holding, in effect, that the person entitled to the reversion would be bound by proceedings taken either by or against the person entitled to the immediate interest in the leasehold—at least that such proceedings would be evidence against him.

Let the order of the Master of the Rolls be reversed, and let the case be sent back to the Master's office for re-consideration, and let notice of all further proceedings be given to Mr. Kennedy, the reversioner.

(a) 2 Ves. jun. 625.

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## TRYE v. THE EARL OF ALDBOROUGH.

HARRISON, . . . . . *Petitioner* ;  
 THE EARL OF ALDBOROUGH, . . . . . *Respondent*.

July 19.

A suit for foreclosure and sale having been instituted in 1833, a judgment was in 1835 recovered against the owner of the equity of redemption in the lands previously to any decree in the cause. In 1838 a decree to account was pronounced in the cause, and in 1842 a final decree for a sale of all the mortgaged estates was made. In 1844 the judgment creditor, who had not at any time been a party to the cause, obtained on petition a receiver on foot of his judgment over a part of the mortgaged estates. Held, in reversal of the decision at the Rolls, that the plaintiff in the cause was entitled on motion to have the receiver appointed in the petition matter extended to the cause, inasmuch as the judgment having been recovered *pendente lite* gave the cōuzee no right as against the mortgagee the plaintiff.

Mr. Greene and Mr. Leslie, for the motion, relied upon *The*

*in the cause was entitled on motion to have the receiver appointed in the petition matter extended to the cause, inasmuch as the judgment having been recovered pendente lite gave the cōuzee no right as against the mortgagee the plaintiff.*

*Bishop of Winchester v. Paine (a); Massey v. Batwell (b), and Rutledge v. Rutledge (c).*

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Argument.

The *Solicitor-General* and Mr. Serjeant *Christian*, on behalf of the petitioner, opposed the motion, and cited *Lynch v. Nolan (d)*, *Drew v. The Earl of Norbury (e)*, and *Gaskell v. Durdin (f)*.

The LORD CHANCELLOR.

This case has come before me by way of appeal from the order of his Honour the Master of the Rolls, who refused a motion made on behalf of the plaintiff in the cause of *Trye v. The Earl of Aldborough*, to extend to that cause a receiver appointed in the matter of *Harrison petitioner*, and *The Earl of Aldborough respondent*; in other words, to extend the receiver over certain of the Earl of Aldborough's estates to which he had not been originally appointed, by suggesting the insufficiency of the estate to which the plaintiff must look for payment of his demand. The mortgage under which the plaintiff claims bears date on the 2nd of March 1833; the bill was filed by the mortgagee, whom he represents, about the same time, for the sale of the Earl's estates, including those over which the receiver in the petition matter was appointed subsequently; the mortgagee having died, the present plaintiff revived the suit, a decree to account was pronounced in April 1838, and a final decree in April 1842. The petitioner's judgment was recovered in Easter 1835, and the receiver was appointed under orders of the Court of Exchequer made in April and May 1844; the petitioner was not a party to the cause.

Judgment.

As between the plaintiff and the Earl of Aldborough, I have not heard any thing urged on the part of the petitioner which affords grounds for declining to grant this motion, now made by the plaintiff quite as a matter of course; it seems necessary for his purposes;

(a) 11 Ves. 194.

(b) 4 Dr. & War. 58; S. C. 5 Ir. Eq. Rep. 382.

(c) 8 Ir. Eq. Rep. 84.

(d) 10 Ir. Eq. Rep. 57.

(e) 3 Jo. & Lat. 261; S. C. 9 Ir. Eq. Rep. 171, 524.

(f) 2 Ball & Beatty, 169.

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and I do not find that the Earl of Aldborough has been able to allege or suggest that the estate is sufficient to meet the plaintiff's demand. The motion was resisted at the Rolls, on the ground that the receiver had been appointed in the petition matter, and the petitioner was not a party to the cause.

The case of *Lynch v. Nolan* (*a*) is said to have been relied on there. But that case differs materially in its facts from the present case, and only decides that, upon an application by a prior creditor, on the consent of the inheritor, to extend a receiver obtained by a puisne judgment creditor, the Court will not disturb the latter, who, though a party in the cause, has not filed his answer, his time for doing so not having expired. But here the cause appears to have been instituted many years ago, the bill having, as I have already observed, been filed in 1833. In the year 1835, pending the cause, the petitioner obtained his judgment against the Earl of Aldborough, who then had only an equity of redemption in the lands. This judgment therefore having been so entered *pendente lite* could not, as against the plaintiff, have conferred upon the petitioner any legal rights against the lands; and there cannot be any question that the petitioner, having so taken his judgment against the Earl of Aldborough when owner of a mere equitable estate, is bound by the proceedings in the cause. True, there has been a final decree in the cause for a sale, but that decree has not yet been carried out, and the cause is still in operation, and in a condition admitting of the appointment of, or extension of, a receiver. That the judgment creditor against the equitable estate is bound by the decree and proceedings in the cause, though not a party to it, is established by many cases; so much so, that it has been over and over again ruled that the purchaser under a decree for sale cannot object to the title on the ground of the existence of such a judgment entered *pendente lite*, the conuzee of which judgment is not a party to the cause. Such was the decision in *Massey v. Batwell* (*b*), Sir Edward Sugden observing:—"The judgments in this case were all recovered *pendente lite*; the parties entitled to them are therefore bound by the

- (*a*) 10 Ir. Eq. Rep. 57.  
 (*b*) 4 Dru. & War. 58; S. C. 5 Ir. Eq. Rep. 382.

decree against Thomas Batwell." And to the same effect is the case of *Leake v. Leake* (*a*). But if it were necessary to go further back, the case of *The Bishop of Winchester v. Paine* (*b*) establishes the same principle. There subsequent mortgagees of an equity of redemption were, on exceptions taken by a purchaser, held bound by a decree of foreclosure, though not made parties; the exceptions were overruled, and specific performance decreed, with costs. Sir William Grant, M. R., said:—"Ordinarily, it is true, the decree of the Court binds only the parties to the suit; but he who purchases during the pendency of the suit is bound by the decree that may be made against the person from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed, otherwise suits would be interminable, or which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined." And again he observes:—"Lord Alvanley's difficulty, as to the mode of directing the re-conveyance in *The Bishop of Winchester v. Beavor* (*c*), could not have been intended to throw any doubt upon a doctrine so clearly established. Lord Alvanley seems at first to have conceived that it was insisted that all incumbrancers universally must be brought before the Court. He was then struck with the inconvenience, observing, that if that were so, wherever such a bill is filed the mortgagor may keep off the decree by confessing a greater number of judgments to his friends. The Counsel in support of the objection disclaimed all idea of carrying it to that length. They say, 'As to the inconvenience mentioned by the Court, if they confessed judgments *pendente lite*, they would be good for nothing.'

Now what is the effect of the decree in this case? It is that the petitioner is, in the words of Sir Edward Sugden, "bound by the decree," or, in the words of Sir William Grant, such judgments are "good for nothing." Mr. Leslie argued very forcibly, that a supplemental bill could not have prayed any thing that was already decreed, but it appears to me unnecessary to go into that question,

(*a*) 5 Ir. Eq. Rep. 361.

(*b*) 11 Ves. 194.

(*c*) 3 Ves. 314.

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for the case is concluded by the authorities ; the case of *L'Estrange v. Robinson* (*a*) is expressly in point. That was a foreclosure suit; the defendant filed his answer, and thereby set up an assignment to William Robinson, who was not a party ; William Robinson, having come in and applied to be examined *pro interesse suo*, relied upon the assignment to him. But Sir William M'Mahon, M. R., said :— “ When a person gets an assignment of property which is the subject of litigation, the question whether he must be made a party to the suit depends upon the interest he has acquired ; if he has acquired the legal estate he must be made a party, not for his own sake, but that he may be compelled by the decree to join in any conveyance which the Court may order ; but if he has not the legal estate he need not be taken notice of, and he will be dispossessed under the injunction of the Court.” And on a subsequent day he said :—“ Mr. W. Robinson's title commenced *pendente lite* ; it only purported to be an assignment of the equity of redemption, and does not make him a necessary party to this cause, as he merely stands in the place of a person under whom he claims. If he desires his title to be taken notice of, he must file a supplemental bill and make himself a party *pro bono et malo* ;” and accordingly in that case a conditional order for letting the lands was made absolute. So far therefore as to the question whether this security being *qua* judgment binding, it having been entered *pendente lite*, that case is in point. But it was suggested that the petitioner obtained the order of Court after the plaintiff had obtained his decree, and it was therefore contended that Harrison the petitioner having acquired the prior possession was not bound. But the question is, what were the rights of the parties now before me at the time of filing the bill ? Harrison's judgment was not then in existence ; when it was recovered he did not acquire any title as against the plaintiff, and he has not since acquired any new title ; his getting possession was merely his putting his rights under the judgment as against the conuzor into execution, just as if he had obtained an elegit at Common Law to which Trye the plaintiff was not a party. I cannot distinguish between the possession under a Court

(a) 1 Harg. 202.

of Equity by a receiver, and that under an *elegit*; and the petitioner could only take possession of what the Earl of Aldborough himself then possessed, and the latter being bound by the decree, the petitioner is so likewise. The plaintiff had only to regard the Earl of Aldborough; it would be introducing a doctrine equally new and embarrassing in its consequences to hold that the petitioner and his assignees *ad infinitum* should be made parties to the cause. As Sir W. Grant says, suits would thus be rendered interminable. It is immaterial whether the petitioner has put his judgment into execution by receiver, by *elegit* or by any other mode.

The order of his Honour the Master of the Rolls must be reversed, the deposit returned, and let the costs be as costs in the matter.

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TRYE  
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EARL OF  
ALDBOROUGH  
Judgment.

#### FITZPATRICK v. NOLAN.\*

June 17.

In this case the cause petition, which was presented on the 27th February 1851, prayed that a certain memorandum of agreement might be specifically performed and carried into execution by the respondent; and that the petitioner might be put into possession of the shop and stock in trade mentioned in the petition, pursuant

A suit cannot be sustained which seeks to enforce an agreement for the continuance of the plaintiff's duties or personal services,

to the defendant, inasmuch as those services might be rendered in a manner productive of injury rather than benefit to the latter; and the Court does not possess the means of compelling a person to fulfil his duty to his employer, under such a contract.

Therefore, where it was agreed that the respondent should "continue to employ the petitioner as salesman," for the purpose of disposing of his stock in trade, on certain terms, some of which tended to show that a sale of that stock to the petitioner was thereby intended, but others positively showed that a relation approaching to that of shopman and owner was for a time to exist between the parties, a petition praying that the agreement might be specifically performed and carried into execution was dismissed.

*Semblé*, that *vice versa*, the employer could not have maintained a suit to oblige the other party to discharge his duty according to the agreement.

*Semblé, also*, that where a date has not been specified in the agreement, although intended to be so, as that at which an important obligation is to arise, this would of itself be, on the ground of uncertainty, an adequate reason for not enforcing the contract.

\* *Ex relatione ALFRED M'FARLAND, Esq.*

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to its terms; petitioner offering on his part to perform same, and to execute the agreement, keep the accounts, and make the payments there referred to, and to do all other acts which he had agreed to perform.

The petition stated that the petitioner was, for the ten years preceding the agreement thereafter mentioned, acting as salesman and conducting clerk in the jewellery establishment of the respondent, in the city of Dublin, at a salary; that in 1850 the petitioner became desirous to open an establishment on his own account, and was encouraged to do so by promises of support from the trade, but was dissuaded by the respondent, and induced to forego his intention by the offer and agreement thereafter stated; that in December 1850 the respondent explained to him his own anxiety to retire from business, but wished to make arrangements by which he might not incur any loss in the disposal of his stock; and various interviews having taken place between them, the respondent handed to the petitioner a letter, the contents of which were in some respects embodied in and in other respects at variance with the engrossment of a memorandum of agreement soon afterwards prepared for the signature of the parties, and whereby it was purported to be agreed, amongst other things, that the respondent should continue to employ the petitioner as salesman, for the purpose of selling off the stock, from the 1st of January 1851; that such stock should from that day be entered in the stock book at the first cost prices; that the respondent should, in lieu of salary, allow the petitioner to sell that stock at any price he pleased over the prices so entered, and after paying the respondent £100 a-year until the stock was reduced to £750, the entire residue of the profits should be retained by the petitioner instead of salary, the respondent paying the expense of a person to be approved of and employed by him, and not charging any rent for the shop until, as the words in the engrossment were—"the period hereinafter mentioned" (but in point of fact, the date was not subsequently alluded to); and also paying the license, &c.; the petitioner, however, was to bear all other incidental expenses; that all the goods sold should be regularly entered in a book to be kept in the shop by the petitioner, and

to belong to the respondent, and to remain at all times open for his inspection ; that the petitioner should pay over the amount of sales to the respondent once in every week, or oftener, at the convenience of the respondent ; that no part of the stock above £10 should be sold on credit, without the written consent of the respondent ; that the petitioner should not purchase or sell in said concern any goods on his own account that would interfere with the sale of the stock of the respondent, nor, until after the execution of a bond therein specified, buy any goods in the name, &c., of the respondent, take same on sale, &c., nor receive any into the establishment not purchased on his own credit, and invoiced expressly to himself ; and that the invoice of all goods purchased prior to the passing of the bond should be exhibited to the respondent ; that if the petitioner should violate any of the conditions contained in the agreement, the respondent was to be at liberty to rescind it, and none of its provisions should be "considered or construed as parting with the possession of said stock in trade, or his full control over it," until after the passing of the bond ; and that when by sale the stock should be reduced to the sum of £750, the respondent was to sell, and the petitioner to purchase the residue of, that stock and the lease of the house, on certain terms.

The petition further stated that the agreement was to take effect from the 1st of January 1851 ; and though not signed on that day, the respondent desired the petitioner to go on with the business as if the agreement were signed. That the petitioner, with the concurrence of the respondent, desired to inform the public of that arrangement, and by the instructions of the respondent he prepared a draft circular for that purpose, and submitted same to the respondent, who, however, did not return it, or cause it to be published, although he procured a new stock and cash-book, and had the net amount of the stock entered in the former. That on the 1st of January 1851, the petitioner commenced the business under the agreement, and carried on same with the sanction of the respondent. That the goods sold were regularly entered as provided for in the agreement ; and on the 18th of January the book containing those entries was examined and checked by the respondent, and the amount of the eighteen

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days' sale ascertained, and handed by the petitioner to the respondent, who wrote at foot, "Settled this 18th of January 1851;" and on the 1st of February the book was again examined by the respondent, and the amount of the sales paid in like manner, though the book was not signed on that occasion. That the petitioner frequently pressed to have the agreement executed, and requested the respondent to sign it, but the latter refused to do so, or to abide by it; and on the 3rd of February 1851 compelled the petitioner to leave the premises.

The answering affidavit of the respondent stated, amongst other things, that after the agreement had been engrossed, he discovered, on reading it carefully, that it limited no time within which his stock in trade was to be reduced to the sum of £750, and that the petitioner could, if he were so disposed, defer reducing it to that sum, and thus continue the respondent's liability for the expenses of an establishment from which the petitioner would be deriving the entire profits on any new goods he might purchase. That the respondent mentioned the circumstance to his solicitor, who, prior to the 18th of January 1851, engrossed a clause upon his counterpart of the agreement, confining the period to two years, to which, however, the petitioner refused to accede.

Under these circumstances, and having regard to the nature and terms of the agreement itself, the affidavit submitted, that the agreement it was not properly the subject of a suit for specific performance; that even if it were, the respondent had a right at any time to rescind it, though deemed a binding contract on him up to that time.

The affidavit also went into an explanation of the circumstances under which the respondent received from the petitioner the proceeds of the goods disposed of between the 1st of January and 1st of February 1851, and wrote the note in the sale-book; and it submitted that the former had not thus bound himself to the agreement by any part performance.

Argument.

Mr. O'Hara (with whom was Mr. Lynch), for the petitioner, stated the facts, and contended that he was entitled to a decree pursuant to the prayer of the petition.

## The LORD CHANCELLOR.

Have you any authority for the proposition that a Court of Equity will carry into effect such an agreement as the present, or will entertain a suit to enforce the continuance of the petitioner's own service to the opposite party? Were it to do so, might not any servant bring a petition to enforce his contract with his master? Suppose the case here reversed, how could I compel the petitioner to fulfil his part by standing behind the respondent's counter and selling the goods according to the agreement? A Court of Law might perhaps avail you.

## Mr. O'Hara.

This is not the case of master and servant; if it resemble it at all, the analogy is very remote and not to be acted on. The agreement contains express and mutual stipulations regulating the terms upon which the goods are to be sold, profits realised by the petitioner, and the business carried on in general; and so long as the petitioner should adhere to those terms, as he did, it was not open to the respondent to control him in any way; the only right of the latter was, to inspect the books and receive the sums coming to him; still less could he displace the petitioner except by force. Nor would damages at law for breach of the contract be such adequate relief as its specific performance in equity, nor any can authority be quoted to show that this Court will not decree the execution of such an agreement; and in principle it ought.

The *Solicitor-General* and Mr. *Brewster* (with whom was Mr. *F. Walsh*), for the respondent.

The agreement relied on by the petitioner did not exist in fact; even as set out in the petition it was partly in blank, did not correspond with the previous letter, and was uncertain in itself, nor did the petitioner himself, or the respondent ever sign it; at best it was merely inceptive.

The case comes within the rule applicable to agreements for the sale of goods generally, or Government stock, the specific performance of which the Court will not enforce, the goods or stock of one

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man being as available as another; or it should be governed by the considerations which prevail in what are called building cases, and will not be enforced here either. Nor was there sufficient mutuality between the parties to the present arrangement, the petitioner having been in truth but a "salesman," or superior servant in the respondent's establishment. Again, that arrangement, such as it was, has been actually rescinded within its own terms, or may be so at any moment the respondent wishes; and this of itself is a good reason why specific execution of it should not now be decreed: *Milliken v. Milliken* (a); *Hercy v. Birch* (b); *Waters v. Taylor* (c). As to the part performance relied upon as having already taken place, and said to be evidenced by the respondent's note in the sales-book, and the receipt of the proceeds, he has fully explained those acts in his affidavit, and they do not amount to part performance, within the meaning of the expression, in a Court of Equity. If the petitioner have sustained any injury at all, his remedy is really at law.

Mr. Lyneb, in reply.

There is no material discrepancy between the letter and the subsequent agreement, which was acted on by both parties for a month, and a regular settlement made upon foot of it on the 19th January 1851; it is to be viewed as a whole; its general scope, rather than its mere wording, is to be regarded, and then it will appear perfectly certain; nor can the respondent now avail himself of his own wrong, in having declined to fulfil his engagement to sign it; he is equally bound by the part performance, which was deliberate and marked.

The case does not come within the rule, or the considerations referred to on the other side; the contract virtually was for the sale of a jewellery establishment, and the good will of a trade; and this is an agreement which a Court of Equity will enforce. The petitioner was by no means the servant or salesman of the respondent in the ordinary sense; there were stipulations on either side which conferred mutual rights, and entailed mutual liabilities. The only

(a) 8 Ir. Eq. Rep. 16.

(b) 9 Ves. 357.

(c) 15 Ves. 10.

thing that can give colour to the opposite pretence is, the provision in the agreement that the sales-book should always be open to the inspection of the respondent; but the object of this simply was, that he might, if he pleased, satisfy himself of the correctness of the amount handed to him from time to time. If the contract have been determined, it has been so by the unjustifiable act of the respondent, and it cannot be shown that a Court of Equity has refused to decree the specific performance of an agreement, on the ground of its containing a stipulation that it may be made void on the non-performance of certain conditions on the part of the person seeking to enforce it, when they have not been violated hitherto. The proper remedy is not at law, but here.

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#### The LORD CHANCELLOR.

It is difficult to consider this case upon any view that would entitle the petitioner to a specific performance of the contract. It appears to me that there are various objections to it. The petition is not one that seeks to complete the purchase of a house and fixtures merely, but to enforce a contract, consisting of various parts, of which the major portions are uncompleted.

*Judgment.*

If the petitioner had come in, after the parties had acted on all the preliminary terms of the agreement, and rested on that portion of it, which might then have entitled him to the purchase of the house, I could have understood it; but as the case is now submitted, it is doubtful whether there was any contract at all entered into; and important particulars have been departed from in the written agreement, as said to have been drawn up from the letter, especially as relates to the limiting of the employment of the petitioner to a period of two years. The agreement has not been signed by either party, *prima facie* therefore it is a case in which there is no written contract; that would be essential so far as regards the sale of the house, or the employment of the party for a longer period than one year, but not as respects the purchase of the goods.

It is contended, however, that there has been a part performance by the respondent. Now, the acting attributed to him is of a very small character; it is nothing more than a *continuance* of the peti-

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*Judgment.*

titioner in the same occupation he previously held ; that is the whole of the part performance alleged. It is said indeed that the petitioner abandoned other prospects on the strength of the arrangement in question : but nothing of that kind is in evidence ; and even the fact of a person having given up the intention of buying one estate with the view of purchasing another, which he is afterwards disappointed in procuring, has not been regarded in any case that I know of, when he has come to enforce his claim to the latter, as a ground of equity entitling him to specific performance.

But passing by these circumstances, and supposing the agreement to have been signed by the parties, it is very difficult to say what it exactly is. To be specifically executed by this Court, an agreement must be certain, reasonable and mutual ; and in order here to see what would be the character of the decree sought, it became necessary during the argument to inquire what was to be the position of the petitioner himself under the terms of this agreement. But in order to make out that this is such an agreement as this Court would enforce, his Counsel have been obliged to contend that the first provision in it, "that the respondent should continue to employ the petitioner as salesman for the purpose of selling off the stock," is beside the intention of the parties. Various clauses, however, follow, which are only compatible with that position ; and the third confers on the petitioner a certain liberty, "in lieu of salary," which plainly means in lieu of salary as "salesman." Nor was the entire management of the concern to devolve upon the petitioner ; on the contrary, it was expressly provided that some other person should be kept there, who would be approved of and employed by the respondent. Again, the book containing the entries of sales made was to belong to the respondent, and to remain at all times open for his inspection ; credits were not to be given by the petitioner beyond a fixed sum ; neither was he to purchase or sell any goods on his own account that would interfere with the disposition of the respondent's stock ; and until the passing of the petitioner's bond, the invoice of all articles brought into the establishment was to be exhibited to the respondent. I read these provisions as evidencing that the petitioner was to be employed as a *salesman* ; he might deal with the property,

but not so as to interfere with the respondent's rights of ownership ; and by the ninth head, the respondent was empowered, in so many words, to rescind the agreement, should the petitioner violate any of its conditions ; and up to the delivery of the bond, none of the provisions in the agreement were to be taken as a "parting with the possession of the stock in trade" by the respondent. Now "possession" is a word of technical signification, showing that the legal control over these goods was to be considered as still vested in the latter, notwithstanding the agreement with the petitioner. Until the stock was reduced in value to £750, and the bond given, it is plain to me the petitioner was to be only a salesman ; and yet if I were to carry out this agreement by the decree of the Court, I should be obliged to hold that, however negligent or ill-conducted the petitioner might be, he should be continued in that capacity, and in possession of the shop, until he chose to wind up the concern.

Further, I observe that by the agreement the petitioner was not to be charged with any rent until the period "thereinafter mentioned," and I can find none anywhere specified, to which this can be referred, a circumstance which of itself might be a ground for not enforcing the contract ; and altogether it is so uncertain and unreasonable that it ought not to be carried out by this Court, which does not possess the means of compelling a man to fulfil his duty with reference to his employer, under such a contract as this.

The petition must therefore be dismissed, and the petitioner left to his remedy at law, if advised to take it. But as the agreement has, to the embarrassment of all parties, been drawn with very complicated provisions by the respondent's solicitor, and been partly acted on, I do not think the case one for costs.

3 Reg. Lib. Gen., 86.

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—  
*Judgment.*

1852.

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## FARRAN v. MORRIS.\*

Feb. 5.

Upon a consent entered into *bona fide*, by the parties in a cause, and by B the receiver and A a person proposed to fill that office, the Court will order, that A be substituted for B as receiver, and that certain persons be approved of as his sureties, and the security measured at a given sum, without reference, and that B and his sureties be discharged from their recognizance, and that A should pay to B an advance previously made by him for the benefit of the property, and all his costs; and that A should have credit in his accounts for such payment; and that a policy of insurance effected on B's life should be discontinued, and that the life of a third party, already insured by B, should be kept so by A out of the rents, and that the proceeds of such insurance, when realized, should be applied by the latter in recouping his advances; and that he might, from the balance of the rents, also effect an insurance on his own life, as additional security for those advances.

*Secus autem*, where there appears to be an attempt to traffick in the office of receiver.

\* *Ex relatione ALFRED M'FARLAND, Esq.*

appointed receiver over the premises in the pleadings mentioned, upon his entering into security by recognizance ; and that J. T. and D. B., &c., be approved of as his sureties without reference, and the amount of the security measured to the sum of, &c. ; and that the life of H. L. P., one of the *ceux qui vivent* named in the lease of said premises, should be kept insured by Andrew Tiernan instead of Gilbert Elliott in the P. Insurance Company in the sum of £800, and that on the death of the insured the former, after reimbursing himself such sum as he might be then in advance, out of the money to be received from the Insurance Company, should pay the residue into Court to the credit of the cause—for the purposes for which that insurance had been effected—and that after paying the head-rent and other charges properly payable out of the premises, he should apply the profit-rent in defraying the expenses of keeping up that policy, and then in paying himself his poundage, costs and expenses as such receiver, and the above mentioned advances, with interest, and also in effecting a policy of insurance upon his own life, in a like sum of £800, or in such further sum, if any, as might thereafter appear, at the passing of any of his accounts, to be owing to him, until all advances should have been paid off, and for the better securing of which that insurance was also to be effected.

It appeared by a consent in the cause, dated the 6th of October 1838, that to prevent the interest in the premises from being evicted for non-payment of rent, the parties had in that year applied to one T. M. C. to advance the sum of £800, and that he had agreed to do so upon the terms of his being constituted receiver in the room of the person who then filled the office ; and by an order of the Court, of the 9th of October 1838, that consent was made a rule of it, and T. M. C. appointed receiver instead of the former one, by that order removed. And by a further consent bearing date the 20th of January 1845 it was recited, that T. M. C., being anxious to be repaid his money and discharged from his receivership, had entered into an agreement for that purpose with Gilbert Elliott. By an order of the 27th of January 1845 the latter consent was also made a rule of Court ; and accordingly it was directed that T. M. C. should be removed from the receivership, and his recognizance and that of his

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sureties vacated, and said Gilbert Elliott appointed receiver in his room, on giving security in the usual way, he consenting to pay the requisite sum to T. M. C.

Elliott entered upon his office and advanced the money. The sums specified in the consent now before the Court were found due to him on foot of his last account for debt and costs; and it had been agreed between the parties that those sums and the other costs mentioned in that consent should be repaid to him, and that he should be discharged, and Andrew Tiernan appointed in his place, upon the terms above stated.

This consent was signed by the solicitors for the plaintiff and defendant in the cause, and for Elliott and Tiernan; and it was grounded as well upon the former orders as upon an affidavit of Tiernan's solicitor, that in his opinion it would tend, for reasons assigned, to the benefit of the estate and the parties interested, if his client were made receiver. But on the consent being moved before the Master of the Rolls, his Honour was pleased to make no rule on the motion; considering that the granting of it would afford encouragement to future trafficking in the office of receiver.

*Argument.*

Mr. *Otway*, in support of the present application, pressed upon the Court the facts of similar orders having been already made in the cause; and that the object of the party in changing the receiver on the terms stated was *bona fide*. As authority for the other principal provisions in the consent, he cited *Anonymous* (*a*); *Gumming v. Ryan* (*b*).

The LORD CHANCELLOR.

*Judgment.*

The substitution of one receiver for another, on the occasion of a payment in money, is *prima facie* objectionable; but the present seems to be a *bona fide* proceeding; and a similar arrangement was twice sustained by the Court in this very cause. Having those precedents before me, I may therefore make the order now sought. If I conceived that there was any attempt to traffick in the receivership, the case would be different, and I should refuse the motion.

(*a*) 2 Moll. 502.

(*b*) 2 Ir. Eq. Rep. 140.

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## LEATHEM v. ALLEN.

Dec. 3, 4.

**SPECIFIC PERFORMANCE.**—By indenture of the 29th September 1837, between the Governor and Assistants, London, of the New Plantation in Ulster, within the realm of Ireland, of one part, and Conolly M'Causland Lecky of the other part (purporting to be made in consideration of the surrender of a similar indenture of lease of the 23rd of June 1820, of the premises hereinafter mentioned, made between the same parties, for three lives and the term of twenty-eight years), the Governor and Assistants, London, of the New Plantation in Ulster demised, *amongst others*, certain premises in Ship-quay street in the City of Londonderry, to Conolly M'Causland Lecky, for the lives of three persons therein specified, and the survivor of them, and if they should happen to die before the expiration of twenty-eight years from the date thereof, then for the residue of that term of twenty-eight years which should be to come and unexpired at the death of the survivor, at the yearly rent therein reserved, with a covenant by the lessors, with Conolly M'Causland Lecky, his heirs, executors, administrators and assigns, that immediately after the expiration of twenty-one years to commence from the date thereof, or, in case all the lives should die within twenty-one years, then within six months after the death of the survivor, the lessors should at the request of C. M. Lecky, his heirs, executors, administrators and assigns, and on the surrender of this lease, make out and grant to C. M. Lecky, his heirs, executors, administrators and assigns, or such other person as he or they should appoint, a new lease of all and singular the premises demised by the above mentioned lease of the 23rd June 1820, for the natural lives of such three persons as C. M. Lecky, his

An agreement by the vendors to let to the vendees for the term of sixty-one years the premises then occupied by the vendors, “as held under A B,” does not absolve the vendors from the duty of proving the title of their lessor A B.

And, on its appearing that A B was himself only a lessee for three lives, with a covenant for perpetual renewal, *Held*, that the vendors could not make a good title to grant a lease for a term of sixty-one years.

*Held also*, that the fact of other premises (besides those proposed to be let by the vendors) being comprised in the lease to A B, was a fatal objection to the title.

Where there

is an agreement by a vendor, having a derivative estate in lands, to let them for a term of years, and such an agreement, if carried into execution, would operate, not as a lease, but as an assignment of the vendor's estate:—*Quare*, whether specific performance of the agreement will be decreed against the vendee?

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heirs, executors, administrators or assigns, should nominate, and for a term of twenty-eight years concurrent with such three new lives, at the same rent, and which lease should contain all the covenants and conditions in the indenture of the 23rd June 1820 expressed, as well on the part of the lessors and their assigns as on the part of the lessee or lessees in such new lease to be named, his or their heirs, executors, administrators or assigns. And it was by this indenture provided, agreed and declared, that the true intent and meaning thereof, and of the parties thereto, was that the term and estate thereby granted or intended to be granted and agreed to be renewed, should in the manner and upon the terms and conditions in this indenture specified, and not otherwise, be renewable for ever.

The plaintiff's charge having stated the above lease of the 29th of September 1837, alleged that the *ceux qui vivent* in that lease were still living.

It also stated that Conolly M'Causland Lecky, being seised of the premises under the lease of 1820 (recited in the lease of 1837), demised them to Francis Horner by indenture of the 2nd of October 1826, for two lives, and for so many years of the term of twenty-eight years as was then unexpired. By indenture of the 16th of April 1828, Francis Horner assigned his interest in the premises to Samuel Scott, who, by indenture of the 7th of July 1843, assigned them to the plaintiff William Leathem; and the charge averred that he was seised of them in trust for himself and his co-plaintiff Thomas Wallace, for the residue of the term of twenty-eight years, the two lives having expired; and that Conolly M'Causland Lecky had, by letter of agreement of the 27th of October 1847, agreed to grant to William Leathem, as such trustee, a new lease of the premises for the term of sixty-one years from the 1st of November 1847, if taken out immediately.

Before the execution of the lease thus agreed to be granted to the plaintiffs, they entered with the defendant into the agreement contained in the following letter and acceptance thereof:—

“Londonderry, 29th October 1847.

“DEAR SIR—We propose to let to you for the term of sixty-one

years from the 1st of November *proximo*, the premises now occupied by us in Ship-quay-street, as held under Conolly Lecky, Esq., at the yearly rent of £115; you to get possession on the 1st day of May next, and to be under rent from that date; a lease to be taken out by you during the ensuing month.

"John Allen, Esq."

"WILLIAM LEATHEM AND Co.

"I accept of the above.—JOHN ALLEN.

"29th of October 1847."

Subsequently, by indenture of the 30th of November 1847, Conolly McCausland Lecky demised the premises to the plaintiffs, to hold for the term of sixty-one years from the 1st of November then instant.

The defendant having refused to accept a lease from the plaintiffs, they filed a bill against him for specific performance of his contract of the 29th of October 1847.

The cause coming on to be heard on the 21st of December 1849, a decree was then pronounced, referring to the Master to inquire whether the plaintiffs could make a good title to grant the lease mentioned in the agreement in the pleadings in this cause mentioned, bearing date the 29th of October 1847, and when it was first shown that a good title could be made.

By his report of the 14th of August 1850, the Master found that the plaintiffs could not make a good title to grant the lease mentioned in the agreement, inasmuch as any instrument purporting to be such a lease would operate as an assignment of the entire term which the plaintiffs had in the premises, and not as a lease; and also "inasmuch as it appeared that Conolly Lecky, the party under whom the plaintiffs derived, had not himself an absolute term of sixty-one years in the premises, but only a term of three lives or twenty-eight years with a covenant for perpetual renewal, and out of such a term as that last mentioned a valid lease at law cannot be executed for a term of sixty-one years certain."

To this report the plaintiffs filed four exceptions: first, because by the terms of the agreement the defendant had agreed to take such title as the plaintiffs had to the premises under Conolly Lecky; secondly, because the phrase "to let" did not necessarily imply that

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the plaintiffs were to have a reversion in the premises after granting the term of sixty-one years; thirdly, because the estate of Conolly Lecky being for three lives and twenty-eight years, with a covenant for perpetual renewal, was a greater estate than a term of sixty-one years; fourthly, because the terms of the agreement gave the defendant constructive notice of the nature of Conolly Lecky's title.

Argument. Mr. Christian, Mr. Deasy and Mr. Leathem, for the plaintiffs, in support of the exceptions.

The present exceptions relate to matters which are properly the subject of adjudication upon investigation of the title, and it was not necessary to dispose of them before reference: *Wood v. Machu* (*a*); and the decree referring the question of title to the Master, inasmuch as it directed him to ascertain whether the plaintiffs could make a good title to grant the lease "mentioned in the agreement," does not preclude the plaintiffs from now insisting that the defendant agreed to accept a qualified title, and that the Master ought not to have required them to show any further title. The words in the agreement "as held under Conolly Lecky" must be regarded as constituting a contract to accept such title as the plaintiffs derived from Conolly Lecky, and no more: *Freme v. Wright* (*b*); *Wilmot v. Wilkinson* (*c*); *Baxter v. Conolly* (*d*). In *Spratt v. Jeffery* (*e*) the words "as he held the same" were held sufficient to show a contract for qualified title. There is not any authority deciding that a contract for a sub-lease shall not be carried out, merely because it might operate as an assignment. An assignment would be more advantageous than a sub-lease to the defendant, because at any future period he might, by assigning over, relieve himself from the covenants. At all events, if the defendant prefer a lease, he can have one by taking a term less by one day than sixty-one years. When a vendor is not entitled to an estate for the number of years which he contracted to sell, if the deficiency be not great, equity will decree a performance of the contract at a proportionable price: *Mortlock v. Bullet* (*f*); *Sugden's Vendors*, 11th ed., pp. 340, 341.

(*a*) 5 Hare, 158.(*b*) 4 Mad. 364.(*c*) 6 B. & C. 506.(*d*) 1 Jac. & W. 576.(*e*) 10 B. & C. 249.(*f*) 10 Ves. 306; 13 Ves. 77.

And even should the Court require the plaintiffs to show their lessor's title, the estate of Conolly Lecky, being for lives with a covenant for perpetual renewal, that estate is sufficient to support a term of sixty-one years. Moral certainty of title is all that a purchaser can expect, and it is in the highest degree morally improbable that, when the lives expire, Conolly Lecky, who is bound to pay a mere nominal rent (under £5), will not renew. To the term of sixty-one years the plaintiffs had a good equitable title when they entered into the contract, and they have since acquired a legal title.

Finally, the language of the agreement gave the defendant constructive notice of the title of Conolly Lecky; knowing that the title of the plaintiffs was a tenancy under Conolly Lecky, the defendant is fixed with notice of the nature of the lease under which Conolly Lecky held. He must therefore be held to have agreed to take a term of sixty-one years carved out of Lecky's estate under that lease, notwithstanding its nature, and the fact of its including other premises than those now in question: *Spinner v. Walsh* (a); *Vaughan v. Magill* (b); *Daniels v. Davison* (c); *Coppin v. Fernyhough* (d); *Hamilton v. Royse* (e).

Mr. *Francis A. Fitzgerald* and Mr. *D. McCausland*, for the report.

The bill does not sufficiently pray that the defendant should be held to have waived his right to have a good title shown in the lessor, and therefore ought to be dismissed even now: *Clive v. Beaumont* (f).

The construction put by the plaintiffs on the words "as held under Conolly Lecky" should have been stated there. Those words, instead of referring to title as insisted upon, refer merely to occupation. *Spratt v. Jeffery* (g) was a case of sale of a lease, and not of a

(a) 10 Ir. Eq. Rep. 386; S. C. 11 Ibid, 597.

(b) 12 Ir. Eq. Rep. 200; S. C. on appeal, Ibid, 207.

(c) 16 Ves. 249. (d) 2 Bro. C. C. 291.

(e) 2 Sch. & Lef. 315.

(f) 1 De G. & S. 397, et vide *Gaston v. Frankum*, 13 Jur. 739; 2 De G. & S. 561.

(g) 10 B. & C. 249.

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term ; at all events it is overruled by *Shepherd v. Keatley* (*a*) ; *Sugden's Vendors*, 11th ed., p. 392. The *prima facie* construction of the statement in the agreement is, that Conolly Lecky was seized in fee, so that the doctrine of constructive notice cannot apply. The words "to let" cannot mean "to assign." A purchaser will not be compelled to take a lease where he has contracted for an assignment : *Mason v. Corder* (*b*) ; *Sugden's Vendors*, 11th ed., pp. 339, 340 ; and *vice versa*, by parity of reasoning he cannot be compelled to take what will operate as an assignment where he has agreed for a lease. The right to a good title is given by the law, and a condition to dispense therewith will not be inferred from ambiguous expressions : *Hall v. Betty* (*c*) ; *Souter v. Drake* (*d*). Even supposing this a qualified contract, it is one that the plaintiffs had such an interest under Conolly Lecky as would enable them to grant to the defendant a term for sixty-one years certain. Therefore, even in that view, it would be a clear case of misrepresentation.

Another defect in the title is, that the premises agreed to be leased by the plaintiffs are comprised with others in the original lease, under which the lessors had a right to enter for breach of covenant, so that the defendant might be evicted without any breach on his part. This is a fatal objection : *Fildes v. Hooker* (*e*) ; *Blake v. Phinn* (*f*).

These objections appearing on the title produced by the plaintiffs, even though they may not have been bound to show their lessor's title, the defendant is not bound to perform the contract : *Sellick v. Trevor* (*g*) ; *Taylor v. Martindale* (*h*) ; *Warren v. Richardson* (*i*).

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This appears to me to be an extremely plain case. The Master has reported that the plaintiffs cannot make a good title to grant the lease mentioned in the agreement ; first, because any instrument,

(*a*) 1 Cr. M. & R. 117; S. C. 4 Tyr. 571. (*b*) 2 Marsh. 332.

(*c*) 4 M. & Gr. 610; S. C. 5 Scott, N. R. 516. (*d*) 5 B. & Ad. 992.

(*e*) 3 Mad. 193; Sug. V. & P. 11th ed. 563. (*f*) 3 C. B. 976.

(*g*) 11 Mee. & W. 722.

(*h*) 1 Y. & C., C. C. 658.

(*i*) Younge, 1.

purporting to be such a lease, would operate as an assignment of the entire term which the plaintiffs have in the premises; and secondly, because it appears that Conolly Lecky, the person under whom the plaintiffs derive, has not an absolute term of sixty-one years in the premises, but only a lease for three lives or twenty-eight years, with a covenant for perpetual renewal. Whatever I may think of the offer to cure the first objection, by demising the premises for a term less by one day than the term named in the agreement, viz., sixty-one years, and thus to create an underlease and not an assignment, I think that the second objection is not answerable; so I think, too, with respect to a third objection, viz., that Messrs. Leathem and Wallace have no control over a part of the premises contained in the original demise, and any breach of covenant as to that part might cause a forfeiture of the whole. This fact does not appear upon the Master's report; the objection, however, seems unanswerable; and were it necessary to decide the case upon that ground, I should refer it back to the Master.

But the great struggle made here by the plaintiffs is to preclude the defendant from making any of those objections. The contract was as follows:—"Londonderry, 29th of October, 1847. We propose to let to you for the term of sixty-one years, from the 1st of November *proximo*, the premises now occupied by us in Ship-quay-street, *as held under Conolly Lecky, Esq.*, at the yearly rent of £115; you to get possession on the 1st day of May next, and to be under rent from that date; a lease to be taken out by you during the ensuing month—William Leathem and Co.—I accept the above—John Allen. 29th October, 1847."—The plaintiffs insist that the defendant is not at liberty to object to the title; first, because they say he is bound by the special terms of the contract to accept whatever title the plaintiffs can give him; and secondly, because they say that the terms of the proposal, which I have just read, gave him notice of the nature of the title.

In reference to the first point, I must say that this proposal contained no stipulation in express terms as to title—no stipulation as to how far the plaintiffs should show title, or the defendant require it, save so far as these words, "as held under Conolly Lecky, Esq." can

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be so considered. The common rule is, that the vendor of a leasehold is, if required, bound to produce the title of his lessor ; but he may stipulate against that necessity, and, if he do so, the Court will give him the benefit of it. And there is no doubt that this stipulation may be made either by express words or inferred from the mode of description. In *Wilmet v. Wilkinson* (*a*), where certain parties who had purchased the next presentation to a living from Lord Oxford, agreed to sell it to Wilkinson "for the sum of £7500, to be paid for at Michaelmas next, on having such title as they (the vendors) had received from Lord Oxford," it was held that the vendors were not bound to make a marketable title, but only to convey such as they had received from Lord Oxford ; Lord Tenterden saying :—" Now I know not what language a man is to use who intends to sell such a title as he has, and nothing more, if the words of the agreement in question will not suffice to limit his undertaking. If a purchaser unwise bargains to pay for such title as another has, it is his own fault if his money is placed in hazard by the insufficiency of the title." In *Freme v. Wright* (*b*), where one of the conditions of sale of a bankrupt's estate was that the purchasers should have an assignment of it, "under such title as he (the bankrupt) lately held the same, an abstract of which may be seen at the office of Messrs. Tomlinsen and Co., Copthall Court," it was held that the vendee could not insist upon any other title than such as the bankrupt had. Sir John Leach, V. C. E., said :—" Every person who proposes an estate for sale, without qualification, asserts, in fact, that it is his to sell, and consequently that he has a good title ; but a vendor, if he thinks fit, may stipulate for the sale of an estate with such title only as he happens to have ; and the question is, whether these particulars of sale import that the vendors asserted a good title to the estate, or meant only to sell such title as the bankrupt had ?" As to *Baxter v. Conolly* (*c*), it is difficult to say how any doubt could have arisen there. What the consequence will be of an express stipulation that the vendor "should not be obliged to produce the lessor's title" is very fully established by *Shepherd v. Keatley* (*d*). There such a

(*a*) 6 B. & C. 506, 511.

(*b*) 4 Mad. 364.

(*c*) 1 Jac. & W. 576.

(*d*) 1 Cr. M. & R. 117.

condition of sale existed; but the vendee having *aliunde* discovered defects in the lessor's title, it was held that notwithstanding that condition, he was entitled to insist upon the defects.

But it is said that there is a case of *Spratt v. Jeffery* (a), which shows that the defendant here is bound to take the title, such as it is. It is well to see how far that case goes. The words in the present case are "as held under Conolly Lecky, Esq." No one can say, from these terms, whether those words are merely descriptive of the premises, or refer to the title or tenure by which they are held. In *Spratt v. Jeffery*, the words "as he held the same" were referrible either to the two leases and the good-will, or to the words "for a term of twenty-eight years."

A question there arose upon an agreement to accept the two leases and premises "without requiring the lessor's title," and the Court held that the purchaser was not at liberty to object to that title. It was argued here that the present is a stronger case than *Spratt v. Jeffery*, in consequence of the omission of the stipulation as to not requiring the lessor's title. But it is plain that the Court, in *Spratt v. Jeffery*, went upon the construction of the whole instrument. Counsel for the defendant there expressly said that the meaning of the agreement, which was to sell two leases of certain premises, "as he holds the same," for terms of twenty-eight years, was that the defendant merely undertook to sell that title which he had; and that the two leases were clearly the antecedent to which the words "as he holds the same" referred, which were therefore applicable to the holding of the leases and not to the occupation of the premises; and that the proviso as to not requiring the lessor's title was introduced *ex abundanti cautela*, and rather strengthened than weakened what had gone before. Mr. Justice Bayley, in giving judgment, says:—"The defendant agrees to sell, not the premises for the given term, but the two leases and good-will in trade of the premises at a certain sum, as he holds the same, for terms of twenty-eight years." That observation is important here, because this agreement is expressly to let "for the term of sixty-one years, the premises now occupied by us in Ship-quay-street, as

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(a) 10 B. & C. 249; S. C. 5 Man. & Ry. 188.

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held under Conolly Lecky." Mr. Justice Bayley also says :—" The defendant then having bargained to sell the two leases and good-will, the plaintiff agrees to accept an assignment without requiring the lessor's title, and to pay for the same £4200. The fair and reasonable construction of those words is, that he shall not be at liberty to raise any objection to the lessor's title. By the purchase of a bad lease the party may derive the same benefit as if it were good, &c. Upon the whole, it appears to me that the defendant was bound by this contract to assign the leases such as they were ; and that the plaintiff is precluded from calling in question the title of the lessor." Mr. Justice Littledale entertained much doubt upon the case. In reference to the meaning of the words, "as he now holds the same," he says—" Do they describe the premises or the defendant's interest? I think they were meant to describe the interest, viz., twenty-eight years, without reference to, and without affecting the question of title." That is an express declaration of that learned Judge that those words did not refer to title. He proceeds to say :—" It could not be intended to exclude all inquiry as to the title, for the defendant was not the original lessee. Some of the mesne assignments might be defective, and the plaintiff might clearly inquire into any defects except those in the title of the original lessor. The main difficulty arises from the words 'without requiring the lessor's title.' Taking the agreement altogether, I am disposed to say that the defendant contracted to sell a qualified title only." Mr. Justice Parke says :—" There can be no doubt that the vendor of a lease unconditionally undertakes to give a good title, but every person may enter into a qualified contract. This certainly was so to some extent. The question is to what extent the qualification goes? and I think that depends upon the words as to not requiring the lessor's title. They could not mean that the vendor should merely assign such interest as he had, for an objection arising after the original grant might have been made. The words 'as he now holds the same' are ambiguous, but the plaintiff contracted to pay for an assignment without requiring the lessor's title." Those observations show that his judgment was not rested upon the words "as he now holds the same." He then proceeds to say :—" For the

plaintiff it is contended that he is nevertheless at liberty to object to the lessor's title, although the contract does not bind the defendant to produce it; but this is an unreasonable construction, and cannot be sustained." Now if here Mr. Justice Parke meant to say that it would be an unreasonable construction of a contract, providing that the vendor should not be bound to produce his lessor's title, that the vendee should be at liberty to show, *aliunde*, defects in that title, such a position cannot be sustained, and is directly opposed to the decision in *Shepherd v. Keatley*, in which case the Court carefully abstained from saying what conclusion they would have come to upon such a contract as that in *Spratt v. Jeffery*; but they seem to have had some misgiving as to the correctness of the ruling there. In later cases I do not find that it has been followed. In *Duke v. Barnett* (a), Knight Bruce, V. C., observed that he thought *Shepherd v. Keatley* and *Spratt v. Jeffery* were reconcileable; but in the *Treatise on Vendors* (b), Sir Edward Sugden says that "It seems clear that *Spratt v. Jeffery* will not be followed as an authority." Now, I am called upon by the plaintiffs not only to follow it, but to go beyond it, and to say that a contract merely containing those words, "as held under Conolly Lecky," prevents the defendant from objecting to defects in the title. There is also in this case the difference between a contract to sell existing leases, and a contract to grant a new term. It being uncertain whether the words "as held under Conolly Lecky" are meant to be descriptive or referrible to title, and the terms of the contract being ambiguous, in this respect the purchaser is at liberty to put his own construction upon them. In *Seaton v. Mapp* (c), Knight Bruce, V. C., observes:—"I think, and have always thought, that when a vendor sells property under stipulations which are against common right, and place the purchaser in a position less advantageous than that in which he otherwise would be, it is incumbent on the vendor to express himself with reasonable clearness; if he uses expressions reasonably capable of misconstruction, if he uses ambiguous words, the purchaser may generally construe them in the manner most

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(a) 2 Coll. R. 337, 341.

(b) 11th ed. p. 392.

(c) 2 Coll. R. 556, 562.

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advantageous to himself." Applying that observation to the words here, I think that I should go further than any Judge yet has gone, were I to hold that such words exclude the common right of the vendee.

But it is argued that the defendants had notice of the nature of the title, and that such notice was given to them by the language of the agreement itself; that the words "as held under Conolly Lecky" gave notice that the plaintiffs held the premises under Lecky; and further, that those words are notice of the lease from Lecky, and therefore of the principal lease to him, and of all its covenants. I do not deny that the doctrine of notice has been applied to persons dealing for the purchase of limited interests, the Courts holding that, where the tenure is fully referred to, the vendee may be prevented from objecting to the particular contents of a lease. But even admitting that constructively the contract may have given notice of the premises being held by them under Lecky, there is no case showing that, if it were apparent on the face of the lease that the vendor had no title, the vendee would be compelled to complete the purchase. I can never apply the doctrine of notice to cases in which the instrument amounts to an absolute negation of title in the vendor. If the instrument does not convey the title proposed to be sold, that is a fatal objection. Here the plaintiffs had not any estate out of which they could carve a term of sixty-one years. That defects apparent on the instrument referred to, or on the abstract of title delivered by the vendor, may notwithstanding notice of them by the conditions of sale be the ground of successful objection, is decided by the cases of *Taylor v. Martindale* (*a*), and *Sellick v. Trevor* (*b*), in which Mr. Baron Rolfe says:—"But here the title which they did produce is defective on the face of it, and it never could have been intended that the purchaser should be precluded from objecting to the title which the vendors should produce, if defective." Those cases afford a complete answer to the point made by the plaintiffs as to notice. The exceptions here must be overruled.\*

(*a*) 1 Y. & C., C. C. 658.

(*b*) 11 M. & W. 722.

\* NOTE.—*Vide* the two following cases.

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## WRIGHT v. GRIFFITH.

Jan. 23, 24.

**SPECIFIC PERFORMANCE.**—The plaintiff John Wright senior, being seized of the lands of Aughafin in the county of Westmeath, under a lease granted to his ancestor James Wright by the Reverend John Elrington, on the 1st of November 1764, for three lives, subject to the annual rent of £64. 3s. 4d., with a covenant for perpetual renewal upon payment of a fine of £15 at the fall of each life, obtained such a renewal upon the 1st of November 1828.

All the lives in the renewed lease being in existence, the plaintiff in 1849 authorised his nephew John Wright junior to sell the lands for the plaintiff. Accordingly John Wright junior entered into a negotiation with the defendant Arthur Hill Griffith for the sale of the lands to him, which negotiation terminated in the following written agreement:—

“I agree to sell the interest of my uncle John Wright in the lands of Aughafin, to Arthur Hill Griffith, for £400; Mr. Griffith to be entitled to the rents now due, and the crops now growing on said lands; head rent to be cleared to the 1st November 1848; and all taxes to be also cleared up to the present time, July 23rd 1849.

“JOHN WRIGHT junior.”

• “I agree to the above.

“ARTHUR HILL GRIFFITH.”

The defendant immediately entered into possession of the lands, and so continued up to the time of the filing of the bill in the present cause.

On the 13th of August 1849 the defendant paid to John Wright junior £10, which the latter by letter of that date acknowledged to

the bill contains no prayer to that effect.

*Sembler* also, that where an interrogatory is leading, the Court will, *at the hearing*, suppress the deposition to that interrogatory.

Where however only part of an interrogatory is leading, the Court will not suppress more of the deposition than replies to that part.

An agreement “to sell the interest of A B in the lands of Whiteacre” does not absolve A B the vendor from the necessity of proving his lessor's title.

Nor is there any waiver of that necessity by the mere fact of the vendee having taken possession of the lands before production of the lessor's title.

Where an agreement for sale of a leasehold is silent as to the production of the lessor's title, parol testimony is admissible in proof of facts and circumstances constituting a waiver by the vendee of production of the lessor's title.

*Sembler*—that if such a waiver be proved, the Court will declare it to be established although

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be on account of the purchase-money, and undertook to return it in case the purchase should not be completed.

The plaintiff's solicitor having furnished an abstract of the plaintiff's title to the defendant's solicitor, the latter sent it back upon the 3rd of September 1849, with observations thereon, and required that the opinion of Counsel should be taken; one of the observations was in the form of a query to Counsel—"Whether the lessor in the deed of 1764 had power to grant the lease, or whether it was necessary that same should be shown after such a lapse of time?" The abstract and observations having been laid before Counsel, without any objection having been made by the plaintiff's solicitor to the observations, Counsel returned them upon the 9th of October, with his opinion, which commenced thus:—"I would observe that no statement is furnished in the above abstract of the title of the Elrington family to the reversion, or of their power to make the lease of the 1st of November 1764, and the purchaser strictly is entitled to have that title made out. But it is frequently made a condition of sale that the purchaser should not require the vendor to make out the lessor's title. Assuming that the lease of 1764 is valid, I am of opinion that the title above deduced to that lease is sufficient, subject to the observations underneath written, and the result of the searches below directed." Those searches were merely for acts done by the lessees.

On the 8th of October the plaintiff's solicitor informed the defendant's solicitor of having received the opinion of Counsel. On the following day a requisition for a registry search against the persons named in Counsel's opinion; and upon the 16th of October the abstract and Counsel's opinion were left by the plaintiff's solicitor with the defendant's solicitor. On the 18th of October the plaintiff's solicitor required the defendant's solicitor to return the requisition for searches upon the next day, or that otherwise proceedings to enforce a specific performance of the defendant's part of the agreement would be taken. On the 19th of October the defendant addressed the following letter to the plaintiff's solicitor:—

"I have been disappointed in the quarter by means of which I expected to effect the purchase of Aughafin, and I wrote to Mr.

Wright to that effect, saying my trustee declined to make the purchase. If I am to be forced to make the purchase under these circumstances, I must have a saleable title. I referred you to my solicitor upon this point, saying at the same time I was sure he would not ask for any thing unreasonable. Should the sale be completed, it may be that I shall have to sell the property again ; and I must therefore request the lessor's title to be shown to the satisfaction of Counsel. I am sorry that Mr. Wright should suffer any disappointment ; but I would willingly pay all expenses incurred."

To that letter was the following postscript :—

" Some of the tenants deny that they owe the amount of rent returned to me by Mr. Wright. I expect to be in Dublin next week, and I will call upon you. Could you find out whether Colonel Elrington (the head landlord) would sell his interest ?"

After some further correspondence between the parties, the plaintiff's solicitor, upon the 8th of November, still protesting against being bound to deduce the lessor's title, did furnish the defendant's solicitor with the copy of a memorial, found upon the registry, of a settlement executed in 1761, upon the marriage of the Rev. John Elrington, the original lessor of 1764, whereby it appeared that he took only an estate for life in the lands, with remainder to the first and other sons of the marriage, in tail male. This being objected to on behalf of the defendant as insufficient, the plaintiff filed his bill in the present suit, praying a specific performance of the agreement.

The defendant in his answer professed his willingness to complete the contract, provided a good title to the lands were shown, which he asserted had not been done ; and in reply to a charge in the bill, alleging that he had assented to purchase the lands without requiring the deduction of the lessor's title, the answer of the defendant was as follows :—" He (the defendant) admits that immediately after the agreement of the 23rd of July 1849 had been made, and prior to the furnishing of any statement of title, he did, in conversation with John Wright jun., and plaintiff's solicitor, casually express a wish to give as little trouble as possible as to title ; and on the

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assurance that the plaintiff's title to the lands was unquestionable, and on the understanding that the lessor had full power to make the lease of 1764, defendant consented (with this qualification) to dispense with the investigation of the lessor's title, but at the same time referred the matter to defendant's solicitor, saying that he would not give any unnecessary trouble; the true intent and meaning of said conversation being, that the defendant was to have a good and *bonâ fide* marketable title to the lands; and that he (the defendant) immediately afterwards communicated with his solicitor, and directed him to see that he got a marketable title, but not to be unnecessarily strict."

The plaintiff's fourth interrogatory, which was administered to John Wright, jun., after asking as to his visit in August 1849 to the defendant, and as to the nature of it, proceeded thus:—"Did you obtain an interview upon that occasion with said defendant? If yea, set forth the particulars of the conversation which then took place, and what was said therein by the said defendant relative to the agreement entered into by him to purchase said lands, *and whether the said defendant then stated that he would not require the lessor's title to said lands to be deduced previous to his completion of his said purchase.* If not, set forth particularly what said defendant did say in relation thereto."

In reply to that interrogatory, John Wright jun., after stating that he remembered calling (in company with the plaintiff's solicitor, Mr. Lynott, who brought a statement of the plaintiff's title with him), upon the defendant in the latter end of the month of August 1849, subsequently to the signing of the agreement, and then proceeded thus:—"We did upon that occasion obtain an interview with the defendant. On Mr. Lynott looking over the statement, he said that he had gone back to the year 1764, and that he thought that that was fair enough, or that that would do, or something to the like effect, and that the parties would be put to as little expense and trouble as was possible, and that he would not go into the lessor's title. Mr. Griffith then said that it was his wish that there should be as little expense gone to as possible; that he would not require the lessor's title. He then

mentioned to Mr. Lynott to call upon his attorney, Mr. Simmonds, and that they could both arrange the business between them." Subsequently in the same deposition the witness said, "Mr. Griffith stated that he would not require the plaintiff to go into the lessor's title, and Mr. Lynott said that he would not go into it."

Mr. Lynott's deposition to the same interrogatory was to the same effect.

The cause now came on for hearing.

The *Solicitor-General* and Mr. *Brereton*, for the plaintiff, contended—

First—That by the terms of the written agreement of the 23rd of July 1849, the plaintiff was exonerated from the necessity of proving the title of his lessor : *Freme v. Wright* (a); *Molloy v. Sterne* (b).

Secondly—That the defendant, by taking possession of the lands, waived his right, if any, to production of the lessor's title : *Fludyer v. Cocker* (c); *Sugden's Vendors and Purchasers*, p. 167, 11th ed.

Thirdly—That the defendant had expressly waived that right at the interview deposed to by John Wright, jun., and Mr. Lynott.

Mr. *Christian* and Mr. *W. H. Griffith*, for the defendant, insisted on his right to production of the lessor's title, and said that the present case did not fall within *Freme v. Wright* or *Molloy v. Sterne*, but rather within *Fildes v. Hooker* (d), and *Leathem v. Allen* (e), which showed that the stipulation depriving the vendee of his ordinary right to proof of good title must be expressed in clear and unambiguous language ; that in the former of those cases Sir William Grant, M. R., said :—" What is contracted for is not merely a piece of parchment, containing certain covenants ; it is an interest in land which is agreed to be given him : and is this Court to tell the defendant that he has no right to inquire whether the plaintiff has any such interest to give ?" And they also said that the bill should have alleged that the contract was one to purchase the title, whatever it might be.

(a) 4 Mad. 364.

(b) 1 Dra. & Wal. 585.

(c) 12 Ves. 25, 27.

(d) 2 Mer. 424.

(e) *Supra*, p. 683.

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Secondly—That taking possession did not amount to a waiver : *Dixon v. Astley* (*a*) ; *Stevens v. Guppy* (*b*) ; *Burroughs v. Oakley* (*c*) ; *Osborne v. Harvey* (*d*).

Thirdly—That there could not be a parol waiver of the right to production of the lessor's title : *Goss v. Lord Nugent* (*e*) ; *Robinson v. Page* (*f*).

And they objected to the admission in evidence of the depositions of John Wright jun., and Mr. Lynott, made to the fourth interrogatory, which they said was leading, especially that part of it above given in italics. To show that such an objection might be taken at the hearing of the cause, they cited *Delves v. Lord Bagot* (*g*) and 1 *Daniel Chan. Pract.*, p. 856, 2nd ed.

#### The LORD CHANCELLOR.

Judgment.

That part of the fourth interrogatory which asks "whether the said defendant then stated that he would not require the lessor's title to said lands to be deduced previous to his completion of his said purchase," has been objected to as leading. If the observations of Lord Langdale in *Lincoln v. Wright* (*h*) be correct, it may be doubted whether this interrogatory is leading. He says:—"The last objection to the depositions was, that they were taken under interrogatories which were leading, and they are said to be leading on the ground that they ask the witnesses whether it was agreed to the effect suggested in the interrogatories? In the argument it was contended that the interrogatories ought to have asked, not simply whether it was so agreed, but whether it was or was not so agreed? Now it has been held that the interrogatories ought not to be in the form 'was it not so agreed?' that is considered to be leading, but the form 'was it so agreed?' does not appear to me to be suggestive of the answer. It is impossible to examine a witness without referring to or suggesting the subject upon which he is to answer. If the question suggests a particular answer, it is leading and improper.

(*a*) 1 Mer. 133.

(*b*) 3 Russ. 171.

(*c*) 3 Swanston, 159, 169.

(*d*) 1 Y. & C., C. C. 116.

(*e*) 5 B. & Ad. 58.

(*f*) 3 Russ. 119.

(*g*) 2 Fowl. Exch. Pract. 129.

(*h*) 4 Beav. 173.

Questions have also been held to be improper if, suggesting the subject, they are capable of being answered by a simple affirmative or negative, without any circumstances ; but a question 'whether such an event happened' does not suggest the answer that it did happen ; and having read the interrogatories in this case, I think that they are capable of being answered in the affirmative or negative, without circumstances." That case, perhaps, cannot be considered as a binding authority, because there was an appeal made from the decision upon that and several other points in the case. Lord Cottenham dismissed the appeal, without prejudice, however, to any application the defendants might be advised to make, for referring the interrogatories to the Master as leading. The interrogatory there certainly did pretty fully suggest the answer, and the distinction taken by Lord Langdale is a subtle one. But for the plaintiff here it is contended that the objection to the deposition cannot be taken at the hearing. It is certainly very inconvenient that such an objection should not have been taken by motion to suppress the interrogatory, in order that the miscarriage, if any, might be remedied, because I apprehend it would have been within the jurisdiction of the Court to allow a re-examination of the witness. It seems, however, to be established in practice, that in England, when interrogatories are obviously leading, the Court will, without any motion being made to suppress the deposition, reject the evidence at the hearing : *Delves v. Lord Bagot* (*a*) ; 1 *Daniell Chan. Prac.* p. 856, 2nd ed. : 2 *Mad. Chan. Prac.* p. 542, n. e, 3rd ed. I do not say that it is not the practice here also to allow such objections at the hearing. I allowed the deposition to be read *de bene esse*, but upon attentively considering it and the interrogatory, I think that even after suppression of so much of the interrogatory as is leading, and so much of the deposition as relates to and answers that part, there remains sufficient of both to suit the plaintiff's purpose, and to show the nature of the interview between John Wright jun., his agent, and his solicitor, on the one side, and the defendant on the other, and also to show that there was then a parol waiver of the right to production of the lessor's title : as to

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the admissibility of that waiver in evidence I shall state my opinion to-morrow, as well as upon the other points in the case.

Jan. 24.

Judgment.

The LORD CHANCELLOR.

It appears to me plain that this title cannot be forced upon the defendant until the removal of the objection apparent upon the memorial of the settlement executed upon the marriage of the Rev. John Elrington the lessor, whereby an estate for life only seems to have been limited to him, out of which the estate now purported to be sold, viz., an estate for three lives, with a covenant for perpetual renewal, could not have been granted. A question was raised as to whether the plaintiff was in the first instance at all bound to deduce the title of his lessor to the premises. The contract was one made by the nephew of the plaintiff as his agent, "to sell the interest of his uncle John Wright (the plaintiff), in the lands of Aughafin." The extent of the plaintiff's interest not being set forth, this agreement admits of some latitude of interpretation. It has been contended for the plaintiff, that the true construction of this contract is, that it was an agreement to sell the plaintiff's interest, whatever it may have been, and no more. But no authority has been referred to which went so far as to hold that a mere agreement by A B to sell his interest in certain lands absolved him from the duty of making out a good title. In *Freme v. Wright* (a), the assignees of a bankrupt put up an estate of the bankrupt for sale, and one of the particulars of sale was, that the purchaser should have an assignment of the bankrupt's interest to one moiety of the estate, "under such title as he lately held the same, an abstract of which may be seen at the office of Messrs. Tomlinson and Co., Copt-hall-court; but the title deeds and leases are to remain in the possession of the proprietor of the other half share." And Sir John Leach held that the purchaser could not insist upon any other title than such as the bankrupt had. But the words of those conditions of sale were more favourable to the vendors than in the present case; and the conditions pointed to an abstract of the title which the vendors purported to give, from which the inference was plain that they intended to give no other title. In *Melloy v. Sterne* (b), the

(a) 4 Madd. 364.

(b) 1 Dru. & Wal. 585.

agreement was that the plaintiff there should "set by lease to the defendants, or assign if required, for the longest term he could grant." Lord Plunket considered those words sufficient to show that the vendor was not bound to show his lessor's title, and that the case fell within the principle of *Freme v. Wright*. I shall not say any thing further about that case of *Molloy v. Sterne*, than that it appears to me an easier task to find arguments against than in favour of it; but I do not think it necessary to go further with this part of the case.

It was also relied upon by the plaintiff that the mere taking possession was itself sufficient to prevent the defendant from insisting upon the production of title. It was on the other side contended, I think with reason, that the language of the written agreement showed that taking immediate possession formed part of the contract, and could not preclude the defendant from insisting upon a good title. The words were, "Mr. Griffith to be entitled to the rents now due, and the crops now growing on said lands; head rent to be cleared to 1st November 1848; and all taxes to be also cleared up to the present time." And it seems manifest to me, that the parties did not intend or consider that the taking possession was to operate as a waiver of title; their acts prove this, because they continued the negotiation with respect to the title.

The remaining point of the case is of more importance. It has been contended for the plaintiff that there has been an express waiver of his liability to show title. For the defendant it is insisted that the subsequent acts of the plaintiff show him to have abandoned this waiver, even if it had been made, and it was also said that there cannot be any parol waiver of a written contract. The facts are, I think, clear upon the evidence, independently of the passage in the deposition which was objected to on the ground that part of the fourth interrogatory was leading. In August 1849, subsequently to the date of the contract, the plaintiff's nephew and Mr. Lynott his solicitor waited upon the defendant on the subject of title; and Mr. Lynott then informed the defendant that he (Mr. L.) did not intend to make out the lessor's title, and the defendant said that he would not require it. Counsel for the defendant have referred to *Goss v.*

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*Lord Nugent* (a) as amounting to an authority that mere parol waiver of the right of a purchaser to a good title cannot take place. But it is to be observed, with regard to that case and others of similar character, that the stipulation alleged to be waived was expressly made in the written contract, and that the effect of the waiver was to substitute a parol contract for one in writing; and the Court of King's Bench, relying on the Statute of Frauds, held, in *Goss v. Lord Nugent*, which was an action for the purchase-money, that oral testimony was not admissible to show the waiver of the vendee's right to a good title. I should not of course be warranted in holding that parol evidence might be admitted to vary the written contract of the parties; but facts and circumstances may be proved by parol evidence, showing by their conduct that a waiver has been made. John Wright, junior, at the interview referred to, in reply to a question by Mr. Griffith the defendant, as to how he was to manage the lands, said that he could manage them as he pleased. At what precise time Mr. Griffith took possession of the lands does not distinctly appear; I will assume that he had taken possession previously to the conversation just mentioned, but from that time forth he dealt with the lands as his own; he tilled them, cut the crops, turned out some tenants and put in others: and all this occurred after he had distinct notice that the plaintiff would not deduce his lessor's title.

On the 19th of October 1849, the defendant wrote to say that he had been disappointed in the quarter whence he had expected to procure the means of purchasing the lands, because his trustees had declined to make the purchase, but that if he were forced to complete it he should have a saleable title, as he might have to re-sell, and therefore he requested the lessor's title to be shown to the satisfaction of Counsel. It was quite too late for him then to insist upon the production of the lessor's title. He had by his acts clearly waived any such right. Taking all these circumstances together, it is I think a very plain proposition that from the date of the interview down to the time at which the plaintiff furnished the abstract of his lessor's title, which disclosed the marriage settlement of 1761, under which the Rev. Mr. Elrington the original lessor appears to

(a) 5 B. & Ad. 58.

have only taken a life estate, the plaintiff was not bound to furnish the lessor's title. And I do not think that any thing which occurred during the negotiation made any alteration in that respect. I could not infer that the plaintiff had gone into that which by express declaration he had warned the defendant that he would not do. The case must go into the Master's office in the ordinary way, but with a declaration that the plaintiff is not bound to produce his lessor's title. The only difficulty in making that direction is, that the bill does not pray for such a declaration. The bill might have prayed that the waiver should be established; but I do not think this absolutely necessary. Suppose the whole case was open upon the evidence, and the question to be whether title had been made; upon this bill and the facts before me should I not be compelled to hold that title had been made, although the landlord's title had not been shown, unless the defendant was able to prove *aliunde* that the title was defective? I therefore think that I am at liberty to make the declaration. It may be merely matter of form, because it is quite plain now that the plaintiff must clear up the defect in the title which has been disclosed, and to which I have already referred. It is however quite possible that he may be able to show that renewals of the original lease of 1764 have been executed by persons competent to bind the inheritance. At present the case seems likely to resolve itself into a mere question of costs.

Refer it to the Master to inquire and report whether the plaintiff can make out a good title to the said lands and premises, according to the terms of the agreement bearing date the 23rd day of July 1849, in the pleadings mentioned. Declare that in making out such title the plaintiff shall not be obliged to show the title of the lessor under whom he holds the said lands and premises, without prejudice to the defendant showing, if he can, a defect in said title. Let the Master further inquire and report at what time the plaintiff was in a condition to make out such title. Reserve all further directions and costs until the return of the Master's report.

1 *Reg. Lib. Gen.*, fol. 271, 277.

NOTE.—*Vide* the preceding case and the following case.

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## FENNELLY and others v. ANDERSON.

Nov. 7, 10, 13.

Husband and wife may maintain a suit for specific performance of an agreement by them with a third party for the sale to him of lands, whereof the husband is seized in right of the wife.

A contract for sale of "the lessee's interest" in a lease does not exonerate the vendor from the necessity of proving the lessor's title to grant the lease.

**SPECIFIC PERFORMANCE.**—By indenture of the 20th of December 1813, Patrick Lattin and Elizabeth his wife demised, at an annual rent of £113. 15s., to Thomas and James Quan, the lands of Mount Prospect, for three lives, and such other lives as should be afterwards inserted therein under a covenant by the lessors for perpetual renewal (on payment of a nominal fine) contained in the lease.

The lessees' interest having become vested in equal shares in the four female petitioners, in the month of October 1850, three of them being then married, and the fourth unmarried, by indenture, made between them and the husbands of the three who were married, of the one part, and the respondent Paul Anderson of the other part, reciting the lease of 1813, and that the lessees' interest had devolved upon the four female petitioners, and that they and the other parties of the first part had agreed with Anderson to convey to him all their interest in the lands for the sum of £1000, it was witnessed that the parties of the first part thereby covenanted and agreed with Anderson that they would forthwith, and at their own expense, make and deliver to him or his solicitor, on or before the 10th of November then next, "an abstract of their title to the lessees' interest in said recited lease of the 20th day of December 1813, of said lands and premises," and would at their own expense "deduce a clear title thereto; and also that they or their heirs" should and would, on or before the 1st of December then next, on receiving from Paul Anderson, his heirs, executors, administrators or assigns, the said sum of £1000, at his or their cost, by such conveyances and assurances in the law as he or they should reasonably require, "well and sufficiently grant, release, convey, or otherwise assure all and singular the said lands and premises, with the timber and other trees standing and growing thereon, and other the rights and appurtenances, unto and to the use of the said Paul Anderson, his heirs and assigns, or to whom he or they should direct and appoint, free

from all incumbrances, except the rent, renewal fines, covenants and agreements," reserved in the lease of 1813, and the tithe rentcharge, if any, payable out of the lands. Then followed a covenant by Paul Anderson for payment, on execution of such conveyance, of the £1000 purchase money. And the parties of the first part covenanted "to allow the said Paul Anderson, his heirs, executors, administrators or assigns, out of the said sum of £1000 the sum of £15 as and for the costs and expenses of the said Paul Anderson, his heirs, &c., to be by him or them incurred in obtaining from the owner of the fee of the said lands a fee-farm grant thereof under the Act of the 12 & 13 Vic. c. 105."

This indenture was signed, sealed and delivered by all the parties to it, and subsequently to its execution the fourth female petitioner married.

Paul Anderson having declined to complete the contract, the four female petitioners and their respective husbands filed against him the present cause petition, in which they denied that he was entitled to proof of the title of the lessors in the lease of 1813, and insisted that even if he had ever been so entitled, he had under circumstances which it is not necessary here to detail, waived any such right.

The case now came on for hearing.

Mr. *Fitzgerald* and Mr. *Harris*, for the defendants, took a preliminary objection, that a bill filed by husband and wife for specific performance of a contract entered into with respect to the wife's property, in consequence of the want of mutuality, could not be maintained, inasmuch as the other contracting party could not enforce the contract against the wife: *Flight v. Bolland* (*a*) ; *Howell v. George* (*b*) ; *Armiger v. Clarke* (*c*) ; *Emery v. Wase* (*d*) ; *Davis v. Jones* (*e*) ; *Martin v. Mitchell* (*f*).

*Argument.*

And they insisted that if the suit were maintainable, the petitioners were bound to show a good title in their lessor to grant the

(*a*) 4 Russ. 298.

(*b*) 1 Mad. 1.

(*c*) *Bunbury*, 111.

(*d*) 8 Ves. 505 ; S. C. 5 Ves. 846.

(*e*) 1 New Rep. 267.

(*f*) 2 Jac. & W. 425.

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lease of 1813: *Leathem v. Allen* (a); *Anderson v. Higgins* (b); *Shepherd v. Keatley* (c).

Argument. Mr. Greene, Mr. Serjeant O'Brien, and Mr. Lawless, for the petitioners, as to the first point cited *Salisbury v. Hatcher* (d); *Innes v. Jackson* (e), *per* Lord Eldon; *Morris v. Stephenson* (f); *Hall v. Hardy* (g); *Barrington v. Horn* (h); *Harris v. Mott* (i); *Eyston v. Simonds* (k), *per* Knight Bruce, V. C.; *Dowling v. Maguire* (l); and insisted that the principle of *Flight v. Bolland*, where a minor was held incompetent to file a bill for specific performance, had never been applied to the case of a married woman. They also said that as the petitioners now by their bill offered to perform the contract, the Court would, at least, refer it to the Master to inquire whether they could make a good title.

To show that by the terms of the agreement the petitioners were exonerated from the necessity of producing their lessor's title, *Freme v. Wright* (m), *Spratt v. Jeffery* (n), *Mollov v. Sterne* (o), *Deverell v. Bolton* (p), and *Hawkins v. The Eastern Counties Railway* (q), were cited.

To show that, at all events, the conduct of the respondent amounted to a waiver, *Clive v. Beaumont* (r), *Smith v. Capron* (s), *Ogilvie v. Foljambe* (t), *Gaston v. Frankum* (u), and *Morley v. Cook* (x), were cited.

Nov. 13.

Judgment.

The LORD CHANCELLOR.

This case comes before me under circumstances raising a question of importance, which in the present state of the authorities I

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|---|---------------------------|
| (a) <i>Supra</i> , p. 683.                    | (b) 1 Jones & Lat. 718.   |
| (c) 1 Cr. M. & R. 117.                        | (d) 2 Y. & C., C. C. 54.  |
| (e) 16 Ves. 366, 367.                         | (f) 7 Ves. 474.           |
| (g) 3 P. Wms. 187.                            |                           |
| (h) 2 Eq. Cas. Ab. 17, pl. 7; 5 Vin. Ab. 547. |                           |
| (i) 15 Jurist, 978.                           | (k) 1 Y. & C., C. C. 608. |
| (l) Ll. & G. temp. Plunk. 1.                  | (m) 4 Mad. 364.           |
| (n) 10 B. & C. 249.                           | (o) 1 Dru. & Wal. 585.    |
| (p) 18 Ves. 505.                              | (q) 15 Jurist, 979.       |
| (r) 1 De G. & Sm. 397.                        | (s) 7 Hare, 185, 191.     |
| (t) 3 Mer. 53.                                | (u) 2 De G. & Sm. 561.    |
| (x) 2 Hare, 106.                              |                           |

cannot say that I am prepared to decide so as to preclude the further maintenance of the suit.

The contract, being one for the sale of the real estate of married women, has been entered into by them and their husbands, and is specific in its terms, and not alleged to be in any respect unreasonable or improper. The objection raised on behalf of the respondent is that this contract cannot be enforced against him, inasmuch as he could not enforce it against the married women. It is conceded that there is not any case deciding that such an agreement could not be enforced at the suit of the husband and wife. Formerly it was the doctrine of Courts of Equity that such a contract might be enforced against the husband. Decrees have more than once required the husband to procure the wife to levy a fine, or that he should stand by the consequences if she refused. So long as that was the rule of the Court, I apprehend that such an objection as the present would have been unsustainable, because it rests upon the absence of mutuality of remedies for enforcement of the contract, viz., that as the petitioners could not have been compelled to perform it, the respondent cannot be so compelled.

But it is said that according to the modern authorities, the rule appears to have been changed, and that the Court will not compel the husband to procure the concurrence of his wife if she refuse to join him. And that I apprehend is now well settled, notwithstanding any fluctuation of opinion which may have taken place on the point. But still the question remains, whether the change of the doctrine of the Court in that particular involves a change in another; whether although the Court will not enforce the contract against the husband, it will do so against the other party to the agreement, he being competent to perform it, and being aware of the position of the vendors. The only case which by analogy bears upon the point is *Flight v. Bolland* (*a*), where Sir John Leach, M. R., held that an infant cannot sustain a suit for the specific performance of a contract, because the remedy is not mutual. Such undoubtedly was the decision; but it is worthy of note, that Counsel for the plaintiff there said:—"If a husband seised *jure*

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*uxoris* were to contract for the sale of his wife's estate, the husband and wife could enforce the contract against the purchaser; yet if the purchaser were to file a bill against the husband and wife for specific performance, and the husband were to swear in his answer that the wife would not consent, a Court of Equity would not now interfere; it would neither decree the wife to join in the conveyance, nor would it order the husband to procure her concurrence, and send him to prison until that concurrence was obtained." This tends to show that the opinion of the Profession is, that the contract might be enforced by the husband and wife, notwithstanding the want of mutuality. The only answer attempted there by Counsel for the defendant was:—"No case has occurred, or at least none has occurred since the time when it was settled that the Court will not decree a husband, who has contracted for the sale of his wife's estate, to procure her to join in making a good conveyance, in which such a contract has been enforced against the purchaser." The question does not appear to have been adverted to in the judgment of the Court.

The next case in which this point appears to have been alluded to is *Salisbury v. Hatcher* (a), where Knight Bruce, V. C., in the progress of the argument, puts this question:—"Suppose husband and wife, seised in fee in the wife's right, to contract to sell; is there any case which decides that they cannot by bill enforce the contract?" Counsel for the defendant did not venture to say that there was such a decision, but assuming the position to be incontrovertible, replies:—"In that case the purchaser buys the estate subject to the chance of the wife repudiating the contract. But if the contract of sale states the property to be the husband's, and in the course of the negotiation it turns out to be the wife's, the vendors cannot compel a sale." The Vice-Chancellor did not again mention the point, but he decreed specific performance of the contract, which was one for the sale of an estate in fee-simple, in favour of a vendor who at the time of entering into the contract was tenant for life only, the purchaser not having rejected the purchase as soon as he had ascertained the real interest of the vendor, and the latter

(a) 2 Y. &amp; C., C. C. 54.

being able, by the consent of parties interested in remainder, to make a good *prima facie* title to the fee-simple at the hearing. So far, therefore, as regards the modern authorities, since the change in the rule as to enforcing the contract against the husband, no decision has occurred; but to the extent to which the opinion of the Profession at Westminster Hall has been expressed in reference to it, when casually mentioned, that opinion would appear to be in support of the suit in such a case as the present.

Returning to the earlier authorities, I find that in *Daniel v. Adams* (a), which was a suit by a purchaser for the specific performance of an agreement for the sale of real estate by a husband and wife, Counsel for the plaintiff, of whom Mr. Ambler, the reporter, was one, *arguendo*, said, that if a bill had been brought by the husband and wife for performance of the agreement, the purchaser could not have made the objection, and therefore the husband and wife ought not to be permitted to do it on the bill brought by the purchaser. Sir Thomas Sewell, M. R., dismissed the bill, but said that "the argument that both or neither should be bound does not hold in all cases." At all events Mr. Ambler's position was not denied by the Court.

That the objection of want of mutuality of remedy to enforce the contract does not in all cases prevail, is manifested by cases decided under the Statute of Frauds, where it has been held that the plaintiff may obtain a decree for specific performance of a contract signed by the defendant but not signed by the plaintiff. The reason of this doctrine is, that the plaintiff by filing his bill submits to perform his part of the contract; and of the plaintiff's non-signature the other party is not allowed to avail himself, because although he could not have compelled the plaintiff to complete the contract, yet he (the defendant) has, by signing, thought proper to run the chance of the plaintiff performing his part, which, if he do not rely upon the Statute of Frauds, the Court will decree him to perform. True it may be, however, that these decisions rest upon the particular language of that statute.

But in the present case the married women are willing to join in

(a) Ambler, 485, 497.

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the conveyance, and I am not aware of any precedent for holding that the Court will not enforce a contract against a husband and wife where it appears that the wife is willing to concur in performing her part of the contract, if the Court be of opinion that it is a proper contract and one to the benefit of which the plaintiff would irrespectively of the question of the wife's competency be entitled. Nor will the Court, as I am yet aware, on the other hand decline to entertain a suit by the husband and wife, merely on the ground of the wife's incompetency to contract. Pending the negotiation these married women might have validated the contract by acknowledging it under the statute 4 & 5 W. 4, c. 92. The success of every suit for specific performance of contracts with regard to real estate is contingent upon the ability of the plaintiffs to make out title (unless the contract be a qualified one), and upon this question I must deem that this suit is so contingent; therefore if the petitioners cannot or will not convey, there cannot be any relief: but in this respect the case of the parties here is not in my opinion in any greater infirmity than any other case. I can easily imagine instances in which it would be very beneficial to married women that contracts entered into by them and their husbands should be carried out. On the whole, there are difficulties in coming to the conclusion that they cannot; and I should not feel justified in introducing a restriction which may not be a wise one, and which I no where find already established. I therefore shall not, upon the ground of non-mutuality, dismiss this petition.

The next question is one depending on the particular terms of the contract, viz., what is the extent to which the petitioners are bound to make out title to the property? They insist that the contract is a qualified one, and excludes accordingly the ordinary rule that the vendors must show their lessor's title. The contract does not contain any reservation in direct terms as to the extent of title to be made out. The lease is recited to be one for three lives with a covenant for perpetual renewal, and in the conclusion of the contract there is an agreement on the part of the vendors to allow the vendee out of the purchase money the sum of £15 for the costs to be by him incurred in obtaining from the owner of the fee-simple in the lands a

grant thereof in fee-farm under the statute 12 & 13 Vic. c. 105 ; so that it is virtually a contract for the sale of lands in fee-farm. It recites an agreement by the petitioners with the respondent "to convey to him all their interest in the said lands for the sum of £1000." What is their interest ? It is a lease for lives renewable for ever, and having regard to the Renewable Leasehold Conversion Act, it is an estate in fee-farm. The petitioners then covenant that they will at their own expense make out and deliver within a given time "an abstract of their title to the lessee's interest in said recited lease of the 20th day of December 1813 of said lands and premises." The words "their title to the lessee's interest" have been relied on as showing that the compact was merely for the sale of such title as they have to the interest of the lessee, whatever that may have been. Perhaps that passage may only refer to the title deducible from the lessee to the petitioners. But I do not think that it excludes the necessity of proving the title fully. I do not think that it protects them from showing that the lease is one conveying a valid interest. Then comes a covenant by the petitioners that, on payment of the purchase money they will "well and sufficiently grant, release, convey or otherwise assure," not the lease or their interest in it, but "all and singular the said lands and premises with the timber," &c., to the use of the respondent, his heirs and assigns, free from all incumbrances, except the rent, renewal fines and covenants contained in the original lease. There is not a phrase from the beginning to the end of this instrument which imports that the sale was one of a limited interest only. To hold that such a limitation exists here would, it seems to me, almost be rescinding altogether the salutary rule which requires the vendor to prove his title to the property which he affects to sell.

I cannot distinguish this case from *Anderson v. Higgins* (a), where, by an agreement reciting that the vendor was then seised and possessed of certain premises in as full, ample and beneficial a manner as the same were held by him under a lease thereof made to him by the Earl of Lucan, for lives renewable for ever ; and that the vendee had agreed with the vendor "for the actual purchase of

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(a) 1 J. & L. 718.

1851.

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his right, title and interest in and to said lease, and the premises thereby demised, upon clear title being made out to him, for the sum of £1250;" and that it appeared that several judgments had been confessed and remained unsatisfied by the vendor, in consequence whereof and until same were satisfied or paid off, a clear title could not be made to the vendee: it was witnessed that the vendee should cause the judgments, and any other incumbrances that might affect the premises, to be satisfied "so as that the vendee should have a clear and marketable title thereto." And in a subsequent part of the agreement the vendor covenanted with the vendee, "to make out a clear title to the premises, free and discharged from all incumbrances whatsoever." Sir Edward Sugden there said:—"Upon the part of the vendor it is contended that the contract was for a sale of the interest in the lease in question, whatever it might be, and that the parties, when speaking in their contract of a good title being made out, only meant that it should be free from incumbrances. But whatever ambiguity there may be in the first part of the contract there is none in the latter part; for there is an express agreement that the seller shall make out a good and marketable title, free from incumbrances, no doubt; but these words were emphatically introduced, because it was anticipated that delay in completing the sale would arise from paying off the incumbrances. Therefore the contract was not only that a good title should be made out, but also that it should be free from incumbrances. I think it clear upon this contract that the seller was bound to make out a good title." Now I do not think that was even so strong a case against the vendor as the present, because here the contract is to convey, not the title to the lease, but the lands and premises, and contemplates the conversion of the vendor's interest into a fee-farm grant procurable under the statute.

Undoubtedly there are cases which show that if the party mean to sell such interest only as he may happen to have, the contract may be so limited. It is unnecessary that I should now go through those authorities, as I have recently stated my opinion upon them in the case of *Leathem v. Allen* (a), to which I still adhere. By

(a) *Supra*, 683.

merely using the words "all their interest in the said lands," I do not think the vendors have guarded themselves against the production of their lessor's title.—[His Lordship here referred to the broad manner in which the general rule that the vendor of a leasehold must show his title, as laid down by Richards, C. B., in *Purvis v. Rayer* (*a*), and to the observations of Rolfe, B., in *Sellick v. Trevor* (*b*).]—I have no hesitation in holding that the petitioners have not, by the terms of their contract, protected themselves from the operation of the general rule; and that they must show that the original lease is a valid instrument, conveying a good title to an estate for lives renewable for ever. I cannot make any declaration limiting the title, which they are bound to make out.

There is nothing in the case warranting me in saying that there was a waiver of the production of title. The very first question put by Counsel for the respondent was, whether and when the lease was registered?—a very pertinent question; if registered at one time the lease might be good, and *vice versa*.

Mr. Serjeant *O'Brien* asked his Lordship that a letter of the 26th of November 1850 should be especially referred to the Master's consideration.

**The LORD CHANCELLOR.**

I shall neither reserve any question with respect to that letter, nor shall I refer it specially to the Master, although under the general reference as to title, which I now direct, I think that it will be open for him to consider it.

(*a*) 9 Price, 488, 525.

(*b*) 11 M. & W. 722, 729.

**NOTE.**—*Vide* the two preceding cases.

1851.  
Chancery.  
FENNELLY  
v.  
ANDERSON.  
\_\_\_\_\_  
Judgment.

1852.  
Chancery.

**AGNEW v. CONNELL.**

*Jan. 22.*

Where in a cause petition presented by a legatee for the administration of the real and personal estate of the testator, no person who had proved the will was named as a respondent, but the petition stated that four executors had been named in the will, one of whom alone proved it, and had since died, and the others, who were named as respondents, had acted as executors, although they had not joined in taking probate. *Held,* that the case was a proper one for a summary order under the 15th section of the Court of Chancery Regulation Act.

MR. M'FARLAND moved for a summary order of reference upon the cause petition in this case, which sought the administration of the real and personal estate of the late Charles Connell of Belfast, and the payment of a legacy of £250 under his will, bequeathed to the petitioner. No person was made a respondent who had proved the will.—[The LORD CHANCELLOR. I do not see that any personal representative of the testator has been brought before the Court.]—As to that, the facts are these, as disclosed by the petition itself:—Mr. Connell, by his will, named four persons as his executors; one of them alone proved, and is now dead; the others acted as executors by executing deeds and otherwise, though they did not join in taking out probate, and they have been made respondents. Under these circumstances it is submitted that probate to the one enured to the others; that the latter sufficiently represent the estate for the purposes of this suit, and could not now renounce: *Cummins v. Cummins (a).*

The LORD CHANCELLOR.

They could not. You may take a summary order.

(a) 8 Ir. Eq. Rep. 723.

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1. An agreement to purchase a license to use a patent will not, in equity,

preclude a party from disputing its validity. *R. Baxter v. Combe* 284

2. A suit cannot be sustained which seeks to enforce an agreement for the continuance of the plaintiff's duties or personal services to the defendant, inasmuch as those services might be rendered in a manner productive of injury rather than benefit to the latter; and the Court does not possess the means of compelling a person to fulfil his duty to his employer under such a contract. Therefore, where it was agreed that the respondent should "continue to employ the petitioner as salesman" for the purpose of disposing of his stock in trade on certain terms, some of which tended to show that a sale of that stock to the petitioner was thereby intended, but others positively showed that a relation approaching to that of shopman and owner was for a time to exist between the parties, a petition praying that the agreement might be specifically performed and carried into execution was dismissed. *C. Fitzpatrick v. Nowlan* 671

3. *Semblé*—That *vice versa* the employer could not have maintained a suit to oblige the other party to discharge his duty according to the agreement. *Ibid*

4. *Semblé also*—That where a date has not been specified in the agreement, although intended to be so, as that at which an important obligation is to arise, this would of itself be, on the ground of uncertainty, an adequate reason for not enforcing the contract. *Ibid*

A †

## AMENDMENT.

## AMENDMENT.

1. Leave to amend the bill without prejudice to an injunction will not be granted as of course. The motion must be made without delay, and be supported by an affidavit, stating the proposed amendments, and when the matter of them came to the plaintiff's knowledge. *R. O'Beirne v. O'Beirne* 152
2. Where the answer had been filed in April, an application made in August for leave to amend by introducing charges and an interrogatory founded thereon, in avoidance of a defence set up by the answer, was refused. *Ibid*
3. The practice in Ireland in this respect is correctly stated in *Donegal v. Berry* (1 Hog. 46), and differs from the practice in England as stated in *Ferrand v. Hamer* (4 M. & Cr. 113). *Ibid*
4. Where an injunction obtained on filing the bill has upon the coming in of the defendant's answer been continued until the hearing, and the plaintiff for the first time seeks to amend his bill without prejudice to the injunction, the Court will grant a motion to that effect if the proposed amendments be not inconsistent with the case previously made by the bill for the injunction. To sustain such a motion there is not any necessity for an affidavit stating when the matter of the proposed amendments came to the knowledge of the plaintiff. *C. S. C. on appeal* 158

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## ANNUITY.

1. Under a decree pronounced in 1817 in a suit by the grantee of an annuity, charged upon lands, against judgment creditors of the grantor, who were in possession by virtue of writs of *ejectus*, an account was taken of what was due to the grantee, and a receiver was appointed over the lands. *C. L'Estrange v. White* 15
2. The grantor of the annuity was not a party to that suit, and died in 1842

## APPOINTMENT.

without having impeached the accuracy of the account taken in 1817. The grantee having also died, his executor in 1848 (up to which time the receiver had continued in possession) filed a bill against the co-heiresses of the grantor, praying a revivor of the former suit, an account of what was due for arrears of the annuity, and that the sum found due should be declared a charge upon the lands. The defendants insisted that the account taken in the former suit in the absence of the grantor was not binding upon them. *Held*, that in consequence of the acquiescence of the grantor during a period of twenty-five years, and the subsequent acquiescence of the defendants for six years, they were not entitled to have the account of what was due in 1817 taken *de novo*, but that they should be at liberty to surcharge and falsify it. *Ibid*

*See CHANCERY REGULATION ACT, 42.*

## ANSWER.

*See SUPPLEMENTAL ANSWER, 1, 2.*

## APPOINTMENT.

By a petition presented under the 11th section of the Court of Chancery Regulation Act, it appeared that a person entitled to the interest of a legacy of £3000 during her life, with a power to appoint the principal amongst her children (which power did not authorise an exclusive appointment), having three sons and a daughter, by deed in 1834 appointed that sum equally amongst her two younger sons and her daughter, and made a provision *aliunde* for her eldest son. Subsequently the daughter married, and the eldest son died in non-age. The petition stated that the donee of the power having been advised that the appointment in 1834 was not a valid execution of the power, by deed made in 1850 appointed £1900 to one of the surviving sons, £1000 to the other, and £50 to the daughter, and left £50 unap-

pointed. The petition was presented by the two surviving sons, and prayed that the appointment of 1834 should be declared invalid, and that the appointment of 1850 should be declared valid. Counsel appeared at the hearing for the daughter, and supported the prayer of the petition. Her husband, however, resisted the petition, and in his affidavit stated that his wife was, at the instigation of the donee, living separate from him, and that the donee had executed the latter appointment in order to defeat the former appointment, on faith of which he alleged that he had married the daughter; and the affidavit also alleged that the donee of the power was in collusion with her sons for the purpose of obtaining the fund, or a large portion of it, in payment of her own debts. There was not any evidence entered into on either side. The Court refused to make the declaration prayed for, and dismissed the petition without prejudice, and without costs.

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#### APPORTIONMENT.

A fund secured by mortgage was by a marriage settlement, made in 1827, transferred to trustees upon trust to permit the husband to receive the interest of the sum, whether it should continue invested and secured as it was then, or should be invested in any other security, for life, and after his decease upon other trusts, with a power to invest the fund in the public funds or real securities, so that the same, with the interest, dividends, &c., should continue and be applied to the same uses, trusts and purposes. The mortgage having been paid off, and the money vested in £3*1*/<sub>4</sub> per cent. stock:—*Held*, that the representative of the husband, who died in August, was not entitled to any part of the dividends due in the following October. R. *O'Brien v. Fitzgerald* 290

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#### ARREST.

A solicitor was arrested on the direct way from the Taxing Master's office, but it appeared that before his arrest he had deviated considerably from the direct way. *Held*, that he was not entitled to be discharged. R. *Walsh v. Wilson* 610

#### ARTICLES, CONSTRUCTION OF.

By marriage articles the husband agreed to settle out of the lands of K., in failure of A his daughter by a former marriage, a jointure on his intended wife, the remainder of the lands on the issue male begotten on the wife; and in failure of issue male on the issue female; and in case A should survive, and the lands of K. should not be made good, that then the lands of K., which were not settled on the former marriage, should be subject to the jointure, and be settled on the eldest son of the marriage, and in failure of the said son, on the daughters of the said marriage. There was no male issue of the marriage, but female issue, B, C and D.—*Held*, that the lands of K. should be settled on them as tenants in common in tail. C. *Stewart v. The Marquis of Conyngham* 534

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#### ASSIGNMENT.

*See MORTGAGE.*

#### ATTORNEY.

*See ARREST.*

LIEN.

SOLICITOR.

#### BANKRUPT.

1. A trader possessed of a chattel real acknowledged a judgment, and subsequently to its rendition the chattel real was sold under a *fieri facias* upon a *puise* judgment, and the trader was afterwards declared a bankrupt;

*Held*, that the first judgment was not levelled by the bankruptcy, and that its amount might be raised out of the chattel real in the hands of the purchaser, who was one with notice. *C. Willock v. Dargan* 39

2. Where a judgment is not tainted with fraud, the assignee cannot rely on a mere defence at law, which the bankrupt had neglected to make. The consideration for the judgment is always subject to investigation.—  
Bankt. Ct. *In re Jennings* 236

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#### BARRISTER.

*See* COUNSEL.

#### BENEFICE.

*See* TITHES.

#### BOUNDRARIES.

1. Where the boundaries have been confused, or land has been encroached on by the tenant, the question of boundary or encroachment should be determined before a fee-farm grant is executed under the Renewable Leasehold Conversion Act, either by ejectment, or, if there be an outstanding legal estate (as in this case), by an issue. Form of the order directing an issue.

*Semble*.—The Court has no jurisdiction on a petition under the said Act, to issue a commission to ascertain the boundaries. *R. Ireland v. Wilson* 623

#### CALLS.

1. The twenty-one days' notice of a call, required by 22nd section of 8 Vic. c. 16 (Companies Clauses Consolidation Act) must be exclusive of the first and last days. Bankt. Ct. *In re Jennings* 236
2. The abandonment of part of a Railway is no defence to a claim for calls; nor is the non-subscription of the *prescribed* capital a defence. *Ibid*
3. A Railway Company proving against the estate of a bankrupt for calls must,

#### CASES APPROVED OF.

according to the universal principle in bankruptcy, deduct the price or value of the shares from the amount of their claim, or give up the shares for the benefit of the creditors of the bankrupt. *Ibid*

*Vide infra*, 5.

4. Railway calls, made payable by instalments, cannot be enforced. *Ibid*

*Vide infra*, 6.

5. *Held*, in affirmance of the decision of the Commissioner of Bankrupts, *supra*, p. 236, that a Railway Company, proving against the estate of a bankrupt for calls, must deduct the price or value of the shares from the amount of their claims, or give up the shares for the benefit of the creditors of the bankrupt. *C. In re Jennings* 654

6. *Held also*, in reversal of the decision *supra*, p. 236, that Railway calls payable by instalments may be enforced. *Ibid*

7. *Held also*, that the day appointed for payment of the last instalment may be deemed the day upon which the call is payable, and that twenty-one days' notice previous thereto is a valid notice within the 22nd section of the Companies Clauses Consolidation Act. *Ibid*

8. *Semble*.—The non-subscription of the prescribed capital is not a good defence to an action for calls. *Ibid*

#### CASE.

9. Though a bill has been filed on the authority of a reported case, which is afterwards reversed, the Court has not jurisdiction on a motion under the 82nd Rule, to order that the bill shall be dismissed without costs. *R. Cronin v. Murphy* 233

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## CHANCERY REGULATION ACT.

1. On a petition under the Court of Chancery Regulation Act for an account on foot of a legacy charged upon lands, and for payment of the sum found due and for a sale of the lands if necessary, and that all necessary accounts should be taken and a receiver appointed, the Court refused to make a summary order under the 15th section of the Act, being of opinion that although the case fell within the spirit, it was not within letter, of that section. *C. Kirk v. Edmonstone* 17
  2. Where the conuzor of a judgment is alive, the Court will not pronounce a summary order under the Court of Regulation Act, upon a petition praying an account on foot of the judgment, and a sale of the real estate. *C. Ingram v. Russell* 18
  3. Where petitions under the Court of Chancery Regulation Act are un-
- necessarily prolix, the Court will direct the Master to have regard, in the taxation of costs, to the matter improperly introduced. *C. Johnstone v. Linde* 19
4. The Court will not make a summary order of reference upon a petition under the Court of Chancery Regulation Act, to which interrogatories are annexed. *C. Ryan v. Mulligan* 20
  5. To induce the Court to pronounce a summary order of reference under the Court of Chancery Regulation Act for the administration of assets, there should be an affidavit that there is not any other proceeding pending for the same purpose. *C. Triphook v. Griffin* 21
  6. A petition under the Court of Chancery Regulation Act may be verified by the solicitor of the petitioner, but not in the short form given by the Act. The solicitor's affidavit should concisely verify the details of the petition. *C. Griffith v. Magee* 21
  7. Where a petition under the Court of Chancery Regulation Act has been verified by the solicitor and not by the petitioner in the form given by the Act, the Court will not make a summary order under the 15th section; notice must be served of the petition, and it must be set down for hearing as a cause petition. *C. Stackpoole v. Stott* 22
  8. A judgment creditor who has registered an affidavit of ownership of lands by the debtor pursuant to the 13 & 14 Vic. c. 29, which gives to such registration the effect of a mortgage, is entitled to proceed summarily under the 15th section of the Chancery Regulation Act. *C. Woodrooffe v. Fannin* 23
  9. On a petition under the Court of Chancery Regulation Act for a partnership account, it appearing that an arbitration had taken place upon the subject in dispute and that an award was made, although not under seal:—*Held*, that the case was not one for a

## CHANCERY REGULATION.

- summary order under the 15th section of the Act, and that notice must be served upon the respondent. C. *Murphy v. Keller* 24
10. Where a bill would not be sustainable, a petition under the Court of Chancery Regulation Act cannot be supported. Therefore such a petition is open to an objection for multifariousness, should it exist. C. *Cuming v. Taylor* 25
11. Upon a petition, plainly open to such an objection, the Court will not pronounce a summary order of reference without notice. *Ibid*
12. Costs of proceedings before the Court in such a petition are within the jurisdiction of the Court only, and not of the Master. On petitions for the administration of assets, the Court in making an order of reference to the Master will include a direction that the petitioner's costs already incurred shall be payable to him in the same order as his demand (if any), and out of the same fund or by the same party. *Ibid*
13. Where upon a petition presented, under the Court of Chancery Regulation Act, by a creditor on behalf of himself and all other creditors of a deceased person, for administration of his real and personal assets, the usual order of reference to the Master has been made under the 15th section of the Act, the Court will not dismiss the petition on payment to the petitioner of his debt and costs, inasmuch as the order of reference is equivalent to a decree to account in a plenary suit, and therefore confers upon the other creditors an interest in the proceedings. C. *Stokes v. Coltsman* 44
14. "I am quite unable to discover any proceeding which can be deemed in the same light as a decree to account, unless I adopt the order of reference—an analogy raised by the statute itself. The 22nd section clearly puts the order of reference, for the purposes therein mentioned, on the same footing as a decree to account in a plenary suit. There may be inconveniences in adopting that construction, but it is difficult to do otherwise." *Per Brady, L. C.* 49
15. Further observations on the summary jurisdiction of the Court under the 15th section of the statute, *per Brady, L. C. Idem* 48, 49, 50
16. Where a petition, in the nature of a special case, is presented under the 11th section of the Court of Chancery Regulation Act, it is not necessary to the maintenance of such a petition that all the parties interested in the question for adjudication should concur in the statement of facts put forward in the petition. C. *In re O'Reilly* 208
17. Nor is the sanction of the Master necessary to such a petition, where a party interested, but not a petitioner, is under any of the disabilities mentioned in that section. *Ibid*
18. Whether the rights of persons under such disabilities should be bound adversely, must be considered in each case. *Ibid*
19. It is indispensable in every petition under that section that the documents relied on should be fully set out in the petition, or that copies of such documents should be furnished to the Court and to the parties. *Ibid*
20. Where a petition under that section prayed a declaration of the invalidity of an appointment under a power, and of the validity of a subsequent appointment, *Held*, that the donee of the power and an appointee (a *feme covert*), whose husband was a party, were necessary parties. *Ibid*
21. Cause petitions under the Court of Chancery Regulation Act will be heard in the first instance on the petition and affidavits filed in support of or in opposition to the same, and on the answers to any interrogatories which may have been filed; and on such hearing the Court may direct

## CHANCERY REGULATION.

## CHANCERY REGULATION.

- that all or any of the matters stated in such petition or affidavits, which it may be necessary further to have proved or inquired into, shall be so proved or inquired into by further affidavits, or by *viva voce* or written examination, or by the trial of an issue at law, or otherwise, as may be deemed most suitable to the nature of the case, and appoint the mode and times of examination as may be most expedient, and reserve further order and directions thereon until after such proof and inquiry shall be had. C. *Glascock v. Ross* 50
22. Leave given to a mortgagee defendant to file a supplemental answer to a cause petition, varying in some measure the statement of his title to the mortgage as put forward in his original answer, and putting in issue a deed under which he claimed, but which he had forgotten to mention in his original answer. *Ibid*
23. Observations on the policy and construction of the Court of Chancery (Ireland) Regulation Act, *per Brady*, L. C. 55, 56, 57, 58, 59
24. At the hearing of cause petitions, of which notice has been served, junior Counsel should be retained to open the petition as in causes. C. *Russell v. Bevan* note 62
25. Where on a petition praying a reference to the Master under the 15th section of the Court of Chancery Regulation Act, the Court in the first instance declined to make a summary order *ex parte*, and required notice to be served upon a person interested in the subject-matter of the petition;—*Held*, that the Court might afterwards, if it thought proper so to do, make an order of reference to the Master under that section. C. *Murphy v. Keller* 104
26. Interrogatories having been annexed to a cause petition without the leave of the Court, an order was made that they should be allowed to stand, reserving the costs occasioned by them

## CHANCERY REGULATION.

- until the hearing of the cause. R. *O'Malley v. Denny* 118
27. At the hearing of cause petitions under the Court of Chancery Regulation Act, the affidavits of strangers to the cause may be used in support of the case either of the plaintiff or defendant, and the previous permission or direction of the Court is not necessary for this purpose. C. *Hatchell v. Eggleso* 215
28. Accordingly, where to a cause petition for foreclosure or sale the defence set up by the answering affidavit consisted of articles of settlement of a date prior to the mortgage, but not registered until after it, of which articles the respondents alleged that the mortgagee had notice, affidavits filed on behalf of the petitioner, and made by the solicitors engaged on both sides in the mortgage transaction, and denying that the mortgagee had notice of the articles, were allowed to be read at the hearing. *Ibid*
29. The Court, however, at the instance of the defendant, then made an order allowing both parties to examine witnesses on interrogatories generally, as they might be advised. *Ibid*
30. In general, cause petitions should be verified by the petitioner. Form of order on an application that a petition be received without the affidavit of the petitioner. R. *Montgomery v. Eyre* 120
31. Amendments of cause petitions are to be made without alteration, erasure or interlineation, by stating the matter of the amendment at the foot of the affidavit to verify, or by endorsement thereon. R. *Graves v. Holland* 123
32. Form of order on amendments of cause petitions. *Ibid*
33. In general the petitioner must abide the costs of the motion for leave to amend, and of the amendment. *Ibid*
34. Where interrogatories have been annexed to cause petitions, the re-

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spondents are, under the 9th section of the Court of Chancery Regulation Act, until the publication of General Orders under the 31st and 32nd sections to the contrary, entitled to two months' time to file affidavits in answer to such interrogatories; and such cause petitions cannot be set down for hearing until the lapse of two months from the service of notice of filing the interrogatories. C.—*Sheridan v. Cannon* 245

35. Where interrogatories had been annexed to a cause petition which was set down for hearing within two months after service of notice of filing the petition and interrogatories upon some of the respondents, and without any notice to the other respondents, a decretal order obtained on such hearing was set aside, with costs. C. *Ibid* 252

36. *Semble*—It is not a sufficient notice of setting down a cause petition for hearing to state that Counsel will, on behalf of the petitioner, move on the petition "on the first opportunity." *Ibid.*

37. Where notice that a cause petition was "set down in the list of causes for hearing before the Lord Chancellor under the Court of Chancery (Ireland) Regulation Act, 1850," was served upon a respondent, and the petition was set down in the list of causes under the 15th section, the Court being of opinion that such a notice was likely to mislead, refused to make a summary order under that section, and transferred the petition to the general list. C. *Livesay v. Livesay* 254

38. Cause petitions under the Court of Chancery Regulation Act are not pleadings of which attested copies must be taken out of the Rolls office before answering affidavits will be received there. C. *Daly v. Wade* 372

39. Where, upon a cause petition, under the Court of Chancery Regulation Act, presented by a legatee, and containing a charge that the respondent, the executor, has assets in his hands

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sufficient for the payment of all the debts and legacies of the testator, an order of reference has been made under the 15th section of the Act, of which order the executor has been served with notice, but has not appeared in the Master's office, a personal decree may be pronounced against the executor. The effect of such a decree will be to prevent another legatee from filing a charge under the order of reference, and will thus render necessary the presentation of a petition by him in order to enforce his demand. C. *O'Brien v. Westropp* 371

40. The jurisdiction created by the 11th section of the Court of Chancery Regulation Act, is one to be exercised with the greatest possible caution. All facts material to the formation of a correct decision upon each case should be contained within the four corners of the petition. C. *In re O'Reilly* 497

41. An order for re-hearing of a cause petition will be granted on a motion of course, founded upon the certificate of Counsel that the case is a proper one for re-hearing. C. *Blount v. Great Southern and Western Railway Company* 590

42. The Court will make a summary order under the 15th section of the Court of Chancery Regulation Act upon a cause petition, filed by an incumbrancer and annuitant, praying—not redemption, foreclosure, or sale—but the appointment of a receiver over lands, subject to his (the petitioner's) incumbrance and annuity, although a petition for the sale of the same lands has been previously presented in the Incumbered Estates Court by the owner of the lands. C. *Carter v. Carter* 592

43. Where a petition is presented by the personal representatives of a deceased person, praying that the trusts of his will may be carried into execution, and the accounts of his real and personal estate may be taken

## CHANCERY REGULATION.

under the direction of the Court, a summary order, under the 15th section of the Court of Chancery Regulation Act, may be made on the petition, although it does not state that a personal demand of the account sought has been made three weeks before presenting the petition, as required by the 8th General Order of July 1851, that order being applicable only to cases where such an account could be demanded. *C. French v. Craig* 593

44. A party entitled to the interest during his life of a sum of money charged upon lands may, under the 15th and 27th sections of the Court of Chancery Regulation Act, obtain on petition, praying merely a receiver over the lands, a summary order of reference to the Master for that purpose. *C. Bennett v. Briscoe* 594

45. Where a party absolutely entitled to a charge upon lands, in respect of which an arrear of interest was due, presented a cause petition, praying the extension of a receiver, appointed in an annuity cause, to the petition; *Held*, that under the 15th and 27th sections of the Court of Chancery Regulation Act the usual summary order of reference might be made upon the petition. *C. Puxley v. Hutchins* 595

46. The 8th General Order of the 31st of July 1851 applies only to cause petitions presented with respect to the administration of real or personal estate, where a summary order is sought for under the 15th section of the Court of Chancery Regulation Act. *C. Holmes v. Walker* 596

47. Where a cause petition stated a mortgage of lands in 1815, for the sum of £600, containing a covenant by the mortgagor to insure his life for the same sum, and to assign the policy to the mortgagee as a further security for the mortgage debt; and also stated a deed of assignment, in 1845, of the equity of redemption in the lands, upon certain trusts unknown to the petitioner (the assignee of the mort-

## CHARGE.

725

gage), save that he believed that the trustees were empowered to apply the rents in payment of premiums on certain policies of insurance on the life of the mortgagor as a further security for the mortgage debt; and prayed the usual accounts on foot of the mortgage, a foreclosure, a sale of the lands, and that the petitioner might be declared entitled to such of the policies mentioned in the deed of 1845 as should appear to have been effected as a further security for the mortgage debt:—*Held*, that notwithstanding the prayer for relief in respect of policies, the Court had power, under the 15th section of the Court of Chancery Regulation Act, to make a summary order of reference upon the petition. *C. Taylor v. Young* 650

48. *Held also*, that, where such an order has been made, the Master has authority to deal with all objections to the petition on the ground of multifariousness, or of the absence of proper parties. *Ibid*

49. Where in a cause petition presented by a legatee for the administration of the real and personal estate of the testator, no person who had proved the will was named as a respondent, but the petition stated that four executors had been named in the will, one of whom alone proved it, and had since died, and the others, who were named as respondents, had acted as executors, although they had not joined in taking probate:—*Held*, that the case was a proper one for a summary order under the 15th section of the Court of Chancery Regulation Act. *C. Agnew v. Connell* 716

## CHARGE.

1. Devise of Blackacre, subject to the debts of testator, to trustees upon trust, out of the "rents" and "issues," to pay to his three nieces a sum of £1000 at twenty-one or marriage, whichever should first happen, with interest from the period of his death; and in case they should all die before

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twenty-one or marriage, he gave that sum to his nephew. The testator next bequeathed certain annuities, which he directed to be paid out of the "rents, issues and profits" of Blackacre, and gave the annuitants power of distress and entry. He next devised ("after payment of the legacies and bequests aforesaid") Blackacre, and all other his real and personal estate, subject to payment of his debts, legacies, &c., to the same trustees upon trust to pay £40 annually for the maintenance of his nephew during minority, and directed the investment during that time of the surplus "rents, issues, proceeds and profits," such surplus to be paid over to him on his attaining twenty-one; from which time the testator directed the trustees to permit his nephew during his life to receive the "rents, issues and profits" of Blackacre, and the other real and personal estate, with power to jointure, and with remainder over in strict settlement to his (the nephew's) issue. At the date of the will the nephew was nineteen years of age, and the nieces were respectively sixteen, twelve and ten years of age. The testator left personalty to the value of £800. *Held*, that the sum of £1000, bequeathed to the nieces, might be raised by sale of Blackacre, and was not charged upon the annual rents only. *C. Spring v. Stephenson* 132

## CHURCH LEASE.

*See RENEWAL*, 4, 5.

## CIVIL BILL.

1. A civil bill decree binds the defendant's goods from the delivery of the warrant to special bailiffs, not from the delivery of the decree to the Sheriff (unless it be delivered to him to be executed), or his signature of the warrant. *R. Delacour v. Freeman* . 612

## CODICIL.

*See WILL.*

## COMMISSION.

*See BOUNDARIES.*

## COSTS.

## COMPANY.

*See CALLS*, 3, 5.  
CORPORATION.

## CONSENT.

*See INFANT*, 5.

## CONSTRUCTION.

*See AGREEMENT.*

## DEED.

## DEVISE.

## CONTRIBUTION.

1. A person, seized of an estate, and indebted by judgment, afterwards upon his marriage settled that estate upon various trusts for the benefit of his intended wife, and the children of the marriage. The settlement contained a recital that the estate was subject to two annuities, and also contained a covenant for quiet enjoyment, but did not comprise a covenant against incumbrances. Subsequently to its execution the settlor acquired other estates by purchase, and acknowledged other judgments. *Held*, that the prior judgment should be levied wholly out of the unsettled estates, if sufficient, and that the puisne judgment creditors had no right to make the settled estate contribute. *C. Handcock v. Handcock* 444

## CORPORATION.

The exception that members of a Corporation may be parties to a bill of discovery, though they have no personal interest, does not apply to members of Joint Stock Companies, who sue, or are sued, by a public officer. *C. Hendrie v. Thompson* 278

## COSTS.

1. Defendants, as judgment creditors, who had been served with a notice to consent, to be paid according to the priority, made to pay costs. *C. Burke v. Killikelly* 9
2. A defendant who had been ordered to account for the produce of a policy of insurance, in terms *absolutely assigned* to him, but held under the circumstances of the transaction to have been assigned by way of mort-

- gage, decreed his costs as in an ordinary redemption suit, and also the costs of proceeding for the amount of the policy. C. *Murphy v. Taylor* 92
3. The petitioner is entitled to be paid the costs of the appointment of a receiver out of a fund realised by him, in priority to the landlord's claim for rent. R. *Read v. Corcoran* 235
  4. A defendant, who by his answer sets up a breach of covenant by the lessee as a defence to a bill for renewal, and having failed to prove it, must pay the costs occasioned by that defence. C. *Vance v. Ranfurley* 321
  5. Where a party who had contracted for the sale of certain lands died previously to the execution of the conveyance, having by a will, antecedent to the contract for sale, devised all his real estate to trustees (who took the legal estate) upon trust for A for life, with remainder to B for life, with remainder to C, an infant, in tail, a suit for the completion of the contract having been rendered necessary by reason of the infancy of B, the Court decreed specific performance, *with costs of the suit*. C. *Heard v. Cuthbert* 369
  6. In a suit for an account, foreclosure and sale, by a plaintiff having two incumbrances upon the estate, he is not entitled to *all* his costs of suit in priority with his elder incumbrance, but shall be decreed his costs of suit in priority with that incumbrance, save so far as they are occasioned by his puisne incumbrance; and the costs so occasioned he shall be decreed to have in priority with the puisne incumbrance. C. *Handcock v. Handcock* 444
- See CHANCERY REGULATION ACT,*  
10, 12, 33.  
*INFANT*, 1.  
*MORTGAGE*, 1.  
*SECURITY FOR COSTS*.
- COUNSEL.**  
*See CHANCERY REGULATION ACT*, 24.
1. Letters patent, under which lands sold by private contract were held, contained covenants by the grantee—first, that he would place three free tenants of English or British race, blood or name on the premises, each of whom should have fifty acres, or one free tenant, who should have one hundred acres for one life; secondly, that he should have on the premises eight culivers or muskets, and a proper number of arms to arm eight pikemen for his defence against rebels, &c.; thirdly, a proviso, that if he should demise any part of the premises to the mere Irish for any term exceeding forty-one years or three lives, or if he should demise the premises limited to be disposed of to any British or English person, to any person being mere Irish, the Crown might re-enter. The particulars of sale described the lands as a valuable fee-simple property, and one of the conditions of sale alluded to the letters patent. It appeared from a statute (10 Car. 1, sess. 3, c. 3), and certain public documents therein referred to, that the covenants were those inserted in patents at the plantation of Ulster, where the lands were situate. *Held*, that the purchaser, having express notice of the letters patent, was bound by constructive notice of the covenants contained in them. C. *Stewart v. The Marquis of Conyngham* 534
2. *Held also*, that the first and third covenants were no longer in force, every subject of the Crown since the Union being a person of British race, name and blood, and there being no person now answering the description of mere Irish. *Ibid*
3. *Semblable*, the second covenant could not be now enforced by the Crown. *Ibid*
- See PENAL RENT.**  
**RENEWAL.**  
**RENEWABLE LEASEHOLD CONVERSION ACT.**

## CREDITOR'S SUIT.

*See CHANCERY REGULATION ACT, 13, 14.*

## DECREE.

The application for leave to enrol a decree pronounced more than six months previously may be made either by motion or petition. *C. Hamilton v. Hamilton* 253

*See also CHANCERY REGULATION ACT, 13, 14.*

## PENDENCY OF SUIT, 2, 3.

## DEED.

By a deed of separation, reciting that the wife was entitled to certain specified property, and that no provision had been secured to her on the marriage, nor had any part of the property, to which she so became entitled, been limited to the use of the issue (if any) of the marriage, and that the husband had agreed to relinquish, for a certain period, the premises, which were the property to which he became entitled in right of his marriage, and formed a provision far exceeding that reserved to him for his own support, they covenanted to live separate, and that all the wearing apparel, &c., and all other estate and effects, real or personal, to which the wife should, by purchase, gift, devise or bequest, in her favour, &c., during the coverture, become entitled, should be and remain to her separate use; and it was agreed that the wife might dispose of such property as if sole, and the trustees were empowered to use the name of the husband in order to recover any money, &c., which should thereafter be due to the husband in right of the wife. The recited property was then made the subject of settlement. The wife at the time was entitled to a reversionary life interest in a fund, after the death of her mother, who was then alive, which was not referred to in the deed, and afterwards came into possession by the mother's death.—*Held*, on the construction of the deed, that she, and

## DEVISE.

not her husband, in his marital right, was entitled to the latter fund. *R. In re Andrews* 410

## DELAY.

*See INJUNCTION, 7.*

## DELEGATES.

*See WILL.*

## DEMURRER.

*See STATUTE OF LIMITATIONS.*

## DEVASTAVIT.

*See MARSHALLING, 1.*

## DEVISE.

1. By an antenuptial settlement a sum of £7356, the property of the wife, was vested in trustees upon trust that, in case the husband should within six months, by covenant and by a mortgage of certain hereditaments belonging to him, secure payment to them of £4000, they should pay £4356 to him out of the trust money (£356 out of the sum so paid to be for his own use), and upon trust, as to the residue of the trust money left after payment of the £4356, for the wife for her separate use during the joint lives of husband and wife, and for the survivor of them for life, and after the decease of the survivor, upon certain trusts for the children of the marriage, and if no children, upon trust for the wife absolutely if she should survive the husband, but if she should die in his lifetime, upon trust as she should appoint, and, in default of appointment, upon trust for the husband absolutely. As to the mortgage debt of £4000, it was declared that the trustees should stand possessed thereof, and of the securities for the same, upon trust to pay the interest to the husband for life, and after his decease to the wife for life, and after the decease of the survivor upon the same trusts as to the principal of the mortgage debt as were declared of the residue of the trust money for the benefit of the children of the marriage, and if no children, upon trust for the

husband, his executors, administrators and assigns absolutely. Shortly after the marriage the husband executed a mortgage of Whiteacre for the sum of £4000 to the trustees, who thereupon paid over to him the sum of £4356. By his will the husband gave to certain other trustees all his property, real and personal, upon trust to hold the lands of Whiteacre and Blackacre, *first to fulfil the trusts of his settlement*, then for his nephew S. for life, and after his death to his children as he should appoint, remainder over. Several of these remainders over were to females "as *femes soles*." The testator, after bequeathing certain stock to his sister M. and her children, proceeded thus:—"I wish to alter a portion of that part of my will above relating to the funded property bequeathed for M. or her family; should my wife have a child by me, they are to pay S. £500 out of it; should such child or children survive me, my heirs, though life-tenants, may cut, sell and carry away turf off said lands, and cut timber as well off the demesne of Whiteacre as in the churchyard therein." There was also the following clause:—"I give to my beloved wife all our furniture, horses and moveables at Chester, as well as all her own fortune not included in our marriage settlement, for her sole use as a *feme sole* should she marry again." The testator having died without issue—*Held*, that by the devise of Whiteacre and Blackacre upon trust to fulfil the trusts of the settlement, the testator operated both those estates with the mortgage debt, but that he did not devise them upon the same limitations as were contained, in regard to the mortgage debt, in the settlement; and accordingly that neither the wife of the testator took, nor would the children of the marriage, if there had been any, have taken, any estate or interest in those lands under that devise, save as securities for the mortgage debt, but were excluded in favour of S. and the other devisees ~~ever~~.

*Held also*, that the ultimate absolute interest of the testator in the £4000 mortgage debt passed to the wife under the bequest to her of all her own fortune not included in the marriage settlement. C. O'Reilly v. Smyth 349

2. A testator seised of houses and lands for lives renewable for ever, and of no other real estate, devised to trustees all his freehold messuages, lands tenements and hereditaments whatsoever and wheresoever, upon certain trusts, viz., to permit and suffer his daughter during her life to receive an annuity of £100 to be issuing and payable out of all and every *other* his freehold estate or estates situate (here the houses and lands above named were mentioned), to her separate use (and without power to alien or mortgage it), and, after her decease the annuity was to stand to the heirs of her body lawfully issuing, in such shares as she should by will appoint, and in default of appointment then to her said children share and share alike. And the testator directed that £50 per annum should be applied in the maintenance of his daughter until she attained twenty-one or married, and that upon either of those events the trustees were to assign the annuity of £100, and all interest and dividends due thereon, and all securities wherein the same should be placed out or invested, to her for her own sole use and benefit absolutely for ever, with the usual powers of distress and entry upon the devised premises, and every or any part thereof. After a bequest of certain plate and household furniture to his daughter, and of a small annuity to another person, the will contained this clause:—"and in further trust that in case my said daughter shall happen to die before she attain twenty-one and unmarried, I give, devise and bequeath said annuity of £100, and all and every *other* my freehold estates wheresoever as aforesaid unto my brother E. C., for and

during the term of his natural life, and from and immediately after his decease unto and to the use of his right heirs for ever, in such manner as by his last will he should direct, limit and appoint," and the testator bequeathed all his personal estate, subject to his debts, to E. C. The testator's daughter survived him and attained twenty-one. Upon a petition presented under the 11th section of the Court of Chancery Regulation Act on behalf of the children and devisees of E. C., who died almost immediately after his brother the testator, the Court was of opinion that upon the context of the will, the words of contingency "in case my daughter shall happen to die before she attain twenty-one or marriage," must be confined to the annuity of £100, and that accordingly E. C. and his children took estates to the exclusion of the testator's daughter in the freehold property of the testator immediately upon his death; but the case was sent for the opinion of a Court of Law. *C. Campbell v. Campbell* 503

*See also* CHARGE, 1.

#### DISCOVERY.

*See* CORPORATION, 1.  
INJUNCTION, 3, 4.

#### DISMISS.

1. Subsequently to the institution of a foreclosure suit, and to the filing of the answer of certain defendants in that suit, who were incumbrancers prior to the plaintiff, a petition was presented by a near relative of those defendants in the Incumbered Estates Court, and an order was made thereon for a sale of the mortgaged premises. Afterwards a motion was made under the 82nd General Order of 1843, on behalf of those defendants, to dismiss the bill for want of prosecution: this Court refused that motion with costs; but *proprio motu*, stayed the suit. *C. Bernard v. Bond* 198
2. A plea of the pendency of a former suit was put in by a defendant who

afterwards moved to dismiss the bill for want of prosecution under the 82nd Rule. The Court did not require the defendant to file a replication, but referred it to the Master to inquire and report whether the two suits were for one and the same matter. *R. Sadlier v. Whaley*, note 167

*See* CASE.

#### EJECTMENT.

*See* REDEMPTION.

#### ENROLMENT.

*See* DECREE.

#### ESTATE.

*See* DEVISE.  
SETTLEMENT.  
WILL.

#### EVIDENCE.

1. The minute book made evidence by the 8th Vic., c. 16, s. 98 (Companies Clauses Consolidation Act), may be transcribed or made from rough minutes taken at the time of the meeting. Bankt. Ct. *In re Jennings* 236
2. A purchaser relied on the memorial of a deed as creating an objection to the title, and succeeded on an exception founded on it; *Held*, that he could not afterwards object that the deed itself was not produced, although there was no condition of sale to dispense with its production. *R. Stewart v. The Marquis of Conyngham* 534
3. In a cause petition under the Court of Chancery Regulation Act, praying special performance of a contract; *Held*, that a letter referred to by an affidavit made by the petitioner in reply to the affidavit of the respondent, but not put in issue by the original or any amended or supplemental petition, was inadmissible on behalf of the petitioner as evidence of the contract. *C. Duffy v. Johnson* 591
4. *Semblé*, that where an interrogatory is leading, the Court will, *at the hearing*, suppress the deposition to that

## EVIDENCE.

interrogatory. C. *Wright v. Griffith* 695

5. Where however only part of an interrogatory is leading, the Court will not suppress more of the deposition than replies to that part. *Ibid*

*See CHANCERY REGULATION ACT,*  
21, 27, 28, 29.

## EXECUTORS AND ADMINISTRATORS.

*See ADMINISTRATION SUIT.*

BANKRUPT.

CHANCERY REGULATION ACT,  
39.

MARSHALLING.

## EXECUTION.

1. The writ of *fieri facias* sued out under a decree or order of the Court by virtue of the 3 & 4 Vic. c. 105, s. 27, must correspond with the decree or order. Therefore where a separate *fi. fa.* against one issued on a joint order for payment of costs against several, the Court set aside the writ as irregular, but without costs, and paid back the money levied, on the party undertaking not to bring an action in respect of the seizure and sale by the sheriff. R. *Moneypenny v. De Massy* 597

## FEME COVERT.

*See HUSBAND AND WIFE.*  
NEXT FRIEND.

## FINE.

*See STATUTE OF LIMITATIONS, 3.*

## FORECLOSURE.

*See INCUMBERED ESTATES ACT.*

## FURTHER DIRECTIONS.

An objection in point of law, patent on the report, may be taken at the hearing on further directions, though no exception has been filed. C. *Finucane v. Studdert* 140

## GUARDIAN.

*See INFANT, 2.*

## INCUMBERED, &c. 731

### HEARING.

*See CHANCERY REGULATION ACT.*  
FURTHER DIRECTIONS.

## HUSBAND AND WIFE.

Where a person entitled *jure mariti* to chattels real mortgages them, the wife has not any equity to a settlement thereof as against the mortgagees seeking a foreclosure and sale. C. *Hatchell v. Eggleso* 215

*See also APPOINTMENT.*

DEED.

DEVISE.

NEXT FRIEND.

SETTLEMENT.

SPECIFIC PERFORMANCE, 2.

## INCUMBERED ESTATES ACT.

1. A petition for the sale of lands had been presented in the Incumbered Estates Court, but no order had been made thereon, and, without the consent of the Commissioners of that Court, a petition under the Court of Chancery Regulation Act was subsequently presented in this Court on foot of a mortgage of the same lands, praying a foreclosure, sale and account, and that in the meantime a receiver should be appointed. The latter petition charged that the former petition had been presented by the mortgagor in order that he might continue in receipt of the rents until a sale took place, and that in consequence of the arrear of business in the Incumbered Estates Court it was not probable that an order for a sale would be made for a long time. Although at the Bar the mortgagees offered to waive all relief under their petition except the appointment of a receiver, this Court refused to make any order upon their petition, and compelled them to pay to the respondent (the mortgagor) the costs of bringing him before the Court. C. *Murphy v. Sealy* 228

2. A receiver may be appointed, or extended under the Sheriffs' Act, although an order for a sale has been

made by the Commissioners for sale of Incumbered Estates. R. *Corban v. Lord Mountcashell* 234

*See CHANCERY REGULATION ACT, 42.  
DISMISS, 1.*

## INDEMNITY.

*See STATUTE OF LIMITATIONS, 1, 2.*

## INFANT.

1. Where a petition on behalf of an infant is presented by a solicitor who is a stranger to the infant, even although the Master should find that the petition is a proper one, and for the benefit of the infant, the Court will not award out of the infant's estate to the petitioner any costs except costs out of pocket. C. *In re Goode* 256

2. And where such a petition was presented by a solicitor praying investigation into the conduct of a testamentary guardian with respect to the property of an infant, and the Court referred the matter of the petition to the Master, who found that the petition was a proper one, and for the benefit of the infant; and although the Court was not satisfied with the conduct of the guardian, and the circumstances of the case were such as to warrant suspicion, yet as the petitioner had not previously ascertained that none of the relatives or friends of the infant would present such a petition, the Court refused to grant out of the minor's estate even costs out of pocket to the petitioner. *Ibid*

3. The Lord Chancellor of Ireland has power under the statute 4 & 5 W. 4 c. 78, s. 7, to appoint a receiver over the estate of a minor upon a petition, and without the filing of a bill for that purpose. *Ibid*

4. Where there is a testamentary guardian, the law (14 & 15 Car. 2, c. 19, Ir.) authorises him to manage the

## INFANT.

estate of the infant, and the Court will not interfere with or remove him unless it be absolutely necessary so to do; whether the filing of a bill for this purpose would, previously to the Court of Chancery Regulation Act (13 & 14 Vic. c. 89), have been necessary, *quare?* *Ibid*

5. By a marriage settlement a rent-charge and part of a legacy charged by will on real estate, were vested in the children of the marriage, (some of whom were minors), subject to an exclusive power of appointment in the parents. The minors were defendants in a suit to carry the trusts of the will into execution, in which the Master found, upon the consent of the Counsel and trustee of the minors, that the legacies and rentcharges were in equal priority, and that the finding was in the nature of a compromise, and beneficial to the minors. The report was confirmed by a final decree, and the lands of P., among others, were decreed to be sold to pay the several sums reported, in the first instance subject to the rentcharge, and if sufficient was not produced to pay the debts and legacies, then discharged of the said rentcharge; and if the sum arising from such sale should be insufficient to pay the debts, legacies, and value of the rentcharge and costs, the legatees and devisees of the rentcharge should abate rateably. The lands of P. were sold discharged of the rentcharge. *Held*, allowing exceptions to the Master's report of good title, that the report and decree, being founded on a consent which the Court had no jurisdiction to take, were erroneous, and the title under it was bad. R. *Weir v. Chamley* 295

6. Pending an appeal from the above decision, which was affirmed, a deed was executed by the father of the minors, appointing the rentcharge to a son, who was adult when the consent was entered into, and was a party to it, and the legacy to him and two of the minors, who had since come of age. The Lord Chancellor having, on the

## INJUNCTION.

statement that the plaintiff could then show a good title, referred it back to the Master to review his report, who found that a good title could be made by reason of said deed—

*Semble*, that the appointment having been made on an emergency, and not *bona fide* for the end designed by the donor of the power, was void.

*Held*, that the title was too doubtful to be forced on a purchaser, and the exceptions to the Master's further report of good title were also allowed. *Ibid*

*See REDEMPTION*, 1.  
*SCIRE FACIAS*, 2.

## INJUNCTION.

1. To break up a rabbit-warren, unless it be a warren by charter or prescription, is not waste at Common Law, and the Court will not grant an injunction to prevent it. *Quare*, if the warren be demised as such? *R. Lurting v. Conn* 273

2. "If the case rested merely on the matters of fact in issue between the parties, without regard to the question of law, I should have great difficulty in continuing the injunction, because, if the injunction were continued, I might do irreparable damage to the defendant; whereas, if I do not grant the motion, though I might do an injury to the plaintiff, it is not an irreparable injury, for he could recover damages in an action at law, if his case be sustainable in law and in fact. If the bill was dismissed at the hearing, which it would be, provided the defendant established, in point of fact, the defence which he has set up, the Court has no power to direct an issue to ascertain the damages sustained by reason of the injunction. In equity, therefore, the defendant would be without remedy; and if he sued at law, he would be told he had no remedy at law for the injury complained of, as it was sustained in consequence of an order of the Court of Chancery. That is the reason why great caution should be used in cases

## INTEREST.

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of this kind in granting injunctions." *Per Smith, M. R. S. C.* 275

3. A petition was filed against the public officer and several Directors of a Joint-Stock Bank, who all resided out of the jurisdiction, for a discovery in aid of a defence to an action at law by the public officer against the plaintiff, and for an injunction to restrain the action. The injunction was refused because the Directors were not parties to the record at law, and an admission by them would be not evidence against the plaintiff at law. *R. Hendrie v. Thompson* 278

4. But *Semble*, the residence of the Directors abroad, and the want of power to compel a discovery from them, would be sufficient ground for refusing the injunction. *Ibid*

5. "Independently of the reasons which I have stated, the motion should be refused. It is made on the eve of the trial at law, and according to the case of *Thorpe v. Hughes*, that is sufficient ground for refusing it." *Per Smith, M. R. S. C.* 283

6. The Court will not, in the first instance, interfere by injunction to restrain the infringement of a patent, unless there has been long and uninterrupted enjoyment under it, but will direct an action to be brought to try the legal right. *R. Baxter v. Combe* 284

7. Where the patent was obtained in 1846, the alleged infringement of it took place in 1847, and the bill was not filed for more than two years afterwards, the injunction was refused. *Ibid*

*See AMENDMENT*, 1.

## INTEREST.

Interest allowed from the testator's death on a legacy vested at that period, though liable to be divested on the happening of a subsequent event which did not occur. *C. Finucane v. Studdert* 140

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## INTERROGATORIES.

*See CHANCERY REGULATION ACT,*  
3, 26, 34, 35.  
*EVIDENCE*, 3, 4.

## ISSUE.

*See STATUTE OF LIMITATIONS*, 3.

## ISSUE AT LAW.

*See RENEWABLE LEASEHOLD CONVERSION ACT.*

## JOINT STOCK COMPANY.

*See COMPANY.*  
*CORPORATION.*  
*DISCOVERY.*

## JUDGMENT AND JUDGMENT CREDITORS.

1. In the administration of assets, judgments rank *inter se* according to the time of their entry upon the roll under the statute 3 G. 2, c. 7 (*Ir.*) *C. Burke v. Killikelly* 1
2. "Judgments never had any priority as to personal estate; they always had priority *inter se* as to real estate since the Statute of Westminster, according to the Terms of which they were entered." *C. Per Brady, L. C. Idem* 8
3. Observations on the difference between the English and Irish Acts with respect to the docketing of judgments (4 & 5 W. 4, c. 20, *Eng.*, and 3 G. 2, c. 7, *Ir.*) *Ibid*
4. A judgment creditor who has registered an affidavit of ownership of lands by the debtor, pursuant to the 13 & 14 Vic., c. 29, which gives to such registration the effect of a mortgage, is entitled to proceed summarily under the 15th section of the Chancery Regulation Act. *C. Wood-roofe v. Fannin* 23

*See also BANKRUPT*, 2.

*CHANCERY REGULATION ACT*,  
2, 8.

*CONTRIBUTION.*  
*RELEASE*, 1.

## JURISDICTION.

1. *Semble*—The Court has not jurisdic-

## LEGACY.

tion, in opposition to the wish of the inheritor, to discharge solvent tenants, by means of an ejectment for non-payment of rent, from their covenants to pay rent. *C. Hutchins v. Hutchins* 146

2. Where tenants hold under leases of a date prior to that of the appointment of a receiver in a foreclosure suit over the lands which they hold, the Court has not jurisdiction either to remit arrears or to grant a prospective abatement of the rents, which by their leases the tenants are bound to pay, unless the owner of the lands and the plaintiff, and other parties interested in the rents, consent to such remission or abatement; *secus autem* in the case of the estate of an infant or lunatic under the control of the Court. *C. Hamilton v. Nagle* 513

3. *Semble*—The Court has no jurisdiction on a petition under the Renewable Leasehold Conversion Act, to issue a commission to ascertain boundaries. *R. Ireland v. Wilson* 623

*See CHANCERY REGULATION ACT.*

## LACHES.

*See DELAY.*  
*RENEWAL*, 6.

## LANDLORD AND TENANT.

*See JURISDICTION*, 1, 2.

*PENAL RENT.*  
*REDEMPTION.*  
*RENEWAL.*

## LEGACY.

A testator devised lands to A for life, remainder to his sons successively in tail, remainder to B for life, remainder to his sons successively in tail, remainder to testator's nieces C and D, and the survivor, for their respective lives as tenants in common; he also bequeathed to D a sum of £1000, charged upon his real and personal estate, to be by her distributed among her younger children in such shares as she should think proper, provided always that if D should

under the foregoing limitations in the will get into possession of the lands, then the said sum of £1000 should not be paid unto her for the purpose aforesaid. D survived the testator, but died, her life estate in remainder in the lands never having taken effect in possession. *Held*, that she took a vested interest in the legacy of £1000 at the death of the testator, subject to be divested on the happening of the contingency, and accordingly that interest was payable upon the legacy from the testator's decease. C. *Finucane v. Studdert* 140

*See also APPORTIONMENT.*

CHANCERY REGULATION

ACT, I, 39.

CHARGE, I.

SETTLEMENT.

LICENSE.

*See AGREEMENT, I.*

LIEN.

An order having been made in 1847 superseding a commission of bankruptcy against a party, with costs, to be paid by the petitioning creditors, and before those costs were paid that party having been in 1849 discharged under the Act for the Relief of Insolvent Debtors; *Held*, that the assignee in the insolvency matter, who had been one of the petitioning creditors in the bankruptcy matter, took the costs under the order of 1847, subject to the lien of the solicitor who had obtained that order, and that the assignee could not be allowed to set off as against that lien a debt due to himself by the insolvent when those costs were incurred. Upon motion the Court varied the order of 1847, by directing the petitioning creditors to pay to the solicitor the amount of the taxed costs. C. *Ex parte Orr* 102

LIMITATIONS, STATUTE OF.

I. A payment of principal or interest of a sum of money charged upon lands by a person expressly or impliedly

authorised to make it, will be equivalent to a payment by the party liable, so as to prevent the operation of the Statute of Limitations (3 & 4 W. 4, c. 27, s. 40); but a payment by a stranger will not. R. *Homan v. Andrews* 106

2. Parties being seised of the lands of A and B, subject to a term to pay off incumbrances, conveyed A to a purchaser, and B to trustees to indemnify and protect the lands of A from all charges and incumbrances; and by a subsequent deed W, who was the owner of the lands of B, subject to the trust to indemnify, covenanted to pay the interest of one of the charges. *Held*, that it being W's duty to pay the charges, payments of interest by him were payments by an agent, to save the bar of the statute as against the purchaser of A. But *Semble*—The payment of interest by the owner of the indemnity lands, after the expiration of twenty years, would not revive the right to proceed against the purchased lands. *Ibid*

3. By marriage articles the husband agreed to settle out of the lands of K., in failure of A his daughter by a former marriage, a jointure on his intended wife, the remainder of the lands on the issue male begotten on the wife; and in failure of issue male, on the issue female; and in case A should survive, and the lands of K. should not be made good, that then the lands of K., which were not settled on the former marriage should be subject to the jointure, and be settled on the eldest son of the marriage, and in failure of the said son, on the daughters of the said marriage. There was no male issue of the marriage, but female issue, B, C and D. No settlement was executed, and the lands descended to A, B, C and D, subject to the trusts of the articles in 1763, when B, C and D went into possession. In 1783 they levied a fine, and conveyed to a purchaser for value, and covenanted that they were seised in fee. There were several subsequent

conveyances for value. In 1847 the lands were contracted to be sold.—*Held*, in a suit for specific performance against the purchaser, that the legal title of A and her heirs to one-fourth of the lands was barred by the Statute of Limitations, as a Court of Law would not notice the executory trusts of the articles, and the several conveyances operated as disseisins. *Semble*—The equitable title of the heir of A, on failure of issue of B, C and D, was also barred; but—*Held*, that as the fine created no discontinuance in equity, the title was too doubtful to be forced on the purchaser. A conveyance of all her estate, &c., was obtained from the devisee of the heir-at-law of A, and was held to put an end to the objection; for although the reversion belonged to the heir of the settlor, he must trace title through the daughters, and all their right was extinguished by this conveyance and the fine. *R. Stewart v. The Marquis of Conyngham* 535

*See also MARSHALLING, 3.*

#### LIMITATIONS.

*See ARTICLES.*

*DEVISE.*

*SETTLEMENT.*

*WILL.*

#### LIVING.

*See TITHE.*

#### MAINTENANCE.

*See PORTIONS.*

#### MARRIAGE.

*See ARTICLES.*

*SETTLEMENT.*

#### MARRIED WOMAN.

*See HUSBAND AND WIFE.*

#### MARSHALLING.

- Where specialty debts of a deceased person have been paid out of his personal estate, and at the time of such payment the personal estate was sufficient also to pay his simple contract debts, and the executor subsequently commits a devastavit, which renders

#### MEMORIAL.

the personal estate insufficient to pay the simple contract creditors, they are entitled to be paid out of the real estate of the debtor to the extent to which the personal estate has been onerated by the specialty creditors. *C. Ellard v. Cooper* 376

- The dictum of Lord Clare, in *Kearnan v. Fitzsimon* (3 Ridg. P. C. 16), that "the rule of marshalling assets holds only where it is proper to be done at the death of the party whose assets are to be marshalled, and can never arise upon any subsequent fact or accident," considered. *Ibid*
- Simple contract creditors, who have, in consequence of the payment of specialty creditors out of the personal estate of the deceased debtor, acquired a right of marshalling his real estate, are not barred under the Statute of Limitations by the lapse of less than twenty years. *Ibid*

#### MASTER.

- The Court will review the exercise of the Master's discretion in reports under the 145th and 146th General Orders; and it is the duty of the Court to consider both the state of the property and the interests of the parties. *C. Hutchins v. Hutchins* 146
- Where a summary order has been made under the 15th section of the Chancery Regulation Act, the Master has authority to deal with all objections to the petition, on the ground of multifariousness or of the absence of proper parties. *C. Taylor v. Young* 650

*See CHANCERY REGULATION ACT, 7.*

#### OBJECTIONS.

#### MASTER'S REPORT.

*See MASTER 1.*  
*OBJECTIONS.*

#### MEMORIAL.

*See EVIDENCE, 2.*  
*REGISTRY.*

## MORTGAGE ACT.

### MORTGAGE ACT.

In future it will not be necessary to present a petition in order to show cause against an order for a receiver under the Mortgage Act; and all applications under that Act, after an order made on the first petition, may be by motion. *R. Hart v. Cartleton*

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### MORTGAGE.

1. A, for an expressed consideration of £144, by deed of assignment, absolute in its form, assigned to B a life policy of assurance for £999. The deed did not contain any clause authorising B to sue upon the policy, which was of doubtful validity, in the name of A. Contemporaneously with the assignment A executed to B a bond, conditioned for payment of the sum of £144, with interest. The actual consideration of the assignment and bond was the same sum of £144, and consisted partly of a prior debt due by A to B in respect of some bills of exchange discounted for A by B, nearly amounting to a sum of £119, and the residue consisted of £25 cash, of which £20 were paid by B to A, and the remaining £5 were retained by B and handed by him in payment of the costs of the assignment and bond to the person who prepared the same. From the time of the assignment B paid the premiums on the policy into a Savings Bank, with notice thereof to the Company, who had refused to receive them when tendered by B. On the death of the insured, B, with the consent of A, sued the Company in his (A's) name, and eventually compromised the action on payment of £600 to himself (B). Held, on a bill filed by A against B, that the assignment of the policy operated by way of mortgage, and not absolutely, and that therefore A was entitled to an account in respect of the proceeds, but that B should have his costs as in an ordinary redemption suit, and also the costs of the proceedings against the Company. *C. Murphy v. Taylor* 92

## NEXT FRIEND.

737

*See CHANCERY REGULATION ACT,*  
8, 22, 28, 47.

HUSBAND AND WIFE.

INCUMBERED ESTATES ACT.

RECEIVER, 5.

REGISTRY, 3.

### MULTIFARIOUSNESS.

1. A cause petition under the Court of Chancery Regulation Act is open to an objection for multifariousness. *C. Cuming v. Taylor* 25
2. Where a cause petition stated a mortgage of lands in 1815, for the sum of £600, containing a covenant by the mortgagor to insure his life for the same sum, and to assign the policy to the mortgagee as a further security for the mortgage debt; and also stated a deed of assignment, in 1845, of the equity of redemption in the lands, upon certain trusts unknown to the petitioner (the assignee of the mortgage), save that he believed that the trustees were empowered to apply the rents in payment of premiums on certain policies of insurance on the life of the mortgagor as a further security for the mortgage debt; and prayed the usual accounts on foot of the mortgage, a foreclosure, a sale of the lands, and that the petitioner might be declared entitled to such of the policies mentioned in the deed of 1845 as should appear to have been effected as a further security for the mortgage debt;—Held, that notwithstanding the prayer for relief in respect of the policies, the Court had power, under the 15th section of the Court of Chancery Regulation Act, to make a summary order of reference upon the petition.

Held also, that, where such an order has been made, the Master has authority to deal with all objections to the petition on the ground of multifariousness, or of the absence of proper parties. *C. Taylor v. Young* 650

### NEXT FRIEND.

If the next friend of a married woman

be insolvent, the Court will stay the proceedings until the next friend be changed, or she shall give security for costs. *R. M'Keon v. Walsh* 608

## NEXT-OF-KIN.

*See SETTLEMENT*, 2.

## NOTICE.

"I can never apply the doctrine of notice to cases in which the instrument amounts to an absolute negation in the vendor." *Per BRADY, L. C. Leathem v. Allen* 694

*See COVENANT*, 1.

## NOTICE OF PETITION.

*See CHANCERY REGULATION ACT.*

## NOTICE PARTIES.

*See PENDENCY OF SUIT*, 1.

## OBJECTIONS TO MASTER'S REPORT.

"It is right that a general objection should be taken to a report, in addition to objections specially pointing out the questions intended to be raised, as such general objection may prevent the Court being embarrassed by any technical difficulty arising from the frame of the special objections. But the attention of the Master should be called by objections to the points upon which the report is complained of, and the Court should be enabled from reading the objections to understand the precise grounds upon which it is contended that the report is erroneous. It is quite impossible from reading these objections to understand what were the points raised before the Master. I wish, however, to be understood that I do not desire to encourage a course sometimes adopted, and even more objectionable, of filing a vast number of objections to the report, raising the same points." *Per SMITH, M. R. Gardiner v. Blesinton* 68

## OFFICER.

*See SECURITY FOR COSTS*, 1.

## PENAL RENT.

## ORDERS OF COURT.

8th January 1851	255
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## PARTIES.

*See CHANCERY REGULATION ACT*, 20.

## PARTNERSHIP.

*See CHANCERY REGULATION ACT*, 9.

## PATENT.

*See INJUNCTION*, 6, 7.

## PENAL RENT.

A lease for lives, reserving a rent and certain duties, or a sum of money in lieu of duties, with a covenant for perpetual renewal upon payment of a renewal fine, contained a proviso, that if the lessee should not within three months after the fall of each life pay to the lessor or his heirs, &c., the renewal fine over and above the rent, fees and duties, and nominate a new life, the lessor might refuse to renew, a covenant by the lessee to pay fees and duties, sums of money in lieu of duties, and renewal fine; and that if it should happen that the rent, fees and duties, or other sums of money thereinbefore mentioned to be paid as aforesaid should be unpaid for twenty-one days after the days on which the same ought to be paid, the lessee, his heirs, &c., should lose and forfeit to the lessor, &c., one shilling in the pound in the name of a penalty, and so proportionably thereafter for a greater or lesser time, whenever the same should be so behind afterward, and a power of distress as well for the rent, fees and duties, and other the sums of money to be paid for renewal, as for the sums of money so to be lost and forfeited, and a right of re-entry if the rent, fees and duties, or other the sums and penalties above mentioned, or any of them, or any part thereof, should be behind or unpaid. One life having dropped many years before without the renewal fine having

been paid; *Held*, on a petition for a fee-farm grant, that the lessee was bound to pay the penalty of one shilling in the pound on the renewal fine before the grant should be executed.  
R. *Ex parte Sheil* 190

## PENDENCY OF SUIT.

1. A person having a power to appoint £10,000 secured on a term of years, appointed separate portions of the sum to A and B by separate deeds. A filed a bill, to which B was made a notice party, and obtained a decree declaring his portion to be well charged, directing the usual accounts of incumbrances, and a sale for payment of them. B also filed a bill for his portion, praying the same relief, to which a plea of the pendency of the former suit was put in. *Held*, that the two suits were not for the same matter, and the plea was overruled. R. *Sadlier v. Whaley* 167
2. *Quære*—Whether the existence of the decree in A's suit (supposing it to be binding on B) would be a defence in bar of B's suit? *Ibid*
3. But *Semble*, the decree was not binding on B, as he should have been made an answering, and not a notice, party. *Ibid*

*See CHANCERY REGULATION ACT, 5.  
DISMISS, 2.*

## PETITION.

*See CHANCERY REGULATION ACT.  
MORTGAGE ACT.  
RECEIVER.*

## PLEA AND PLEADING.

*See CHANCERY REGULATION ACT,  
38.*

*DISMISS, 2.*

PENDENCY OF SUIT, 1.  
SCIRE FACIAS, 1.

## PORTIONS.

1. A fund was assigned by a marriage settlement to trustees upon trust after the death of A to transfer it and all

the interest, &c., unto and amongst all and every the child or children of the marriage, or the issue of any such child or children who might happen to be then dead, leaving issue, or to any one or more of such children, or issue of such deceased children, &c., at such age or ages, time or times, and in such parts, shares or proportions, if more than one, and with such maintenance in the meantime, and under and subject to such conditions, restrictions, charges and limitations over (such limitations over being for the benefit of some one of such children) as A by his will, &c., should appoint, and in default of appointment to pay the fund between all the children, if more than one, of the marriage, and the issue of any children who should be then dead, leaving issue; and if but one, to such one child; the said fund to be paid, &c., to sons at twenty-one, and to daughters at twenty-one or marriage, in case such ages or days should not take place until after the decease of A; but in case such should happen in his lifetime, then such payment should be postponed until after his decease. A by will appointed the fund to the children of the marriage share and share alike, on their attaining twenty-one or marriage with consent, and directed that the interest should be for their support and maintenance, given in trust to his wife, until the boys entered professions or attained twenty-one, and the girls attained twenty-one or married with consent.

*Held*, first, that the portions were by the settlement vested in the children before the period of payment.

Secondly, that the provision in the will as to maintenance was of itself sufficient to vest the portions. R. *In re Orme's Trust* 175

2. The rules as to the vesting of portions and legacies are the same. *Ibid*

## POWER.

*See APPOINTMENT.*

## PRACTICE.

- See* AMENDMENT.  
CASE.  
CHANCERY REGULATION ACT.  
DECREE.  
DISMISS.  
ENROLMENT.  
EVIDENCE.  
EXECUTION.  
FURTHER DIRECTIONS.  
INJUNCTION.  
JURISDICTION.  
MORTGAGE ACT.  
SECURITY FOR COSTS.  
STAYING SUIT.  
SUPPLEMENTAL ANSWER.

## PRIORITIES.

- See* JUDGMENT, 1, 2, 3.

A testator, seised of P. and other lands, directed all his just debts, funeral expenses and legacies to be paid by his executors, and devised all his real and freehold estates (save a part devised to his wife) upon trust that his wife and her assigns should, after his decease, receive a rentcharge, with power of distress, and that three of his daughters should receive rent-charges, with like remedy by distress and entry as provided with respect to the rentcharge to his wife. The testator then bequeathed pecuniary legacies to his children, and left all the residue and remainder of his real, freehold and personal estates, subject to his debts and the aforesaid legacies and annuities, to the trustees. *Held*, that the rentcharges to the daughters were specifically charged on the same lands as the rentcharge to the wife, and had priority over the legacies which were charged by the residuary clause only. R. *Weir v. Chamley* 295

## PROLIXITY.

- See* CHANCERY REGULATION ACT, 3.

## RAILWAY COMPANY.

- See* CALLS.

## RECEIVER.

1. A receiver may be appointed or

## RECEIVER.

extended under the Sheriffs' Act, though an order for a sale has been made by the Commissioners for Sale of Incumbered Estates. R. *Corban v. Lord Mountcashell* 234

2. The petitioner is entitled to be paid his costs of the appointment of a receiver out of a fund realised by him, in priority to the landlord's claim for rent. R. *Read v. Corcoran* 235
3. The Lord Chancellor of Ireland has power under the statute 4 & 5 W. 4, c. 78, s. 7, to appoint a receiver over the estate of a minor on petition, and without the filing of a bill for that purpose. C. *In re Goode* 256
4. The primary duty of a receiver over a leasehold is out of the sub-rents to discharge the head rent, and this he is bound to do without an order of the Court for the purpose. Accordingly, where a receiver had suffered the lease to be evicted by ejectment for non-payment of rent, and it appeared that, during the period intervening between the last payment of head rent and the execution of the *habere*, he had received rent from a sub-tenant considerably more than sufficient to pay the head rent, and had applied all that sub-rent in discharge of various demands, amongst which were the annual premiums upon certain policies of insurance in which as a creditor of the estate he was interested; and although he was directed to make those payments by an order of the Court, he was compelled by the Court to pay to the landlord the arrears of head rent. C. *Balfe v. Blake* 365
5. A suit for foreclosure and sale having been instituted in 1833, a judgment was in 1835 recovered against the owner of the equity of redemption in the lands previously to any decree in the cause. In 1838 a decree to account was pronounced in the cause, and in 1842 a final decree for a sale of all the mortgaged estates was made. In 1844 the judgment creditor, who had not at any

## RECEIVER.

time been a party to the cause, obtained on petition a receiver on foot of his judgment over a part of the mortgaged estates. *Held*, in reversal of the decision at the Rolls, that the plaintiff in the cause was entitled on motion to have the receiver appointed in the petition matter extended to the cause, inasmuch as the judgment having been recovered *pendente lite* gave the conuzee no right as against the mortgagee the plaintiff. *C. Trye v. Lord Aldborough* 666

6. Upon a consent entered into *bona fide*, by the parties in a cause and by B the receiver, and A, a person proposed to fill that office, the Court will order that A be substituted for B as receiver, and that certain persons be approved of as his sureties, and the security measured at a given sum, without reference, and that B and his sureties be discharged from their recognizance, and that A should pay to B an advance previously made by him for the benefit of the property, and all his costs; and that A should have credit in his accounts for such payment; and that a policy of insurance effected on B's life should be discontinued, and that the life of a third party, already insured by B, should be kept so by A out of the rents, and that the proceeds of such insurance, when realized, should be applied by the latter in recouping his advances; and that he might, from the balance of the rents, also effect an insurance on his own life, as additional security for those advances.

*Secus autem*, where there appears to be an attempt to traffick in the office of receiver. *C. Farran v. Morris* 680

*See CHANCERY REGULATION ACT,*  
44, 45.

**RECEIVER, DUTIES OF.**  
*See RECEIVER*, 4.

**RECEIVER UNDER JUDGMENT  
ACTS.**

*See RECEIVER*, 1.  
TITHE, 2.

## REDEMPTION.

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### RECOGNIZANCE.

*See SCIRE FACIAS*, 3.

## RECOVERY.

A recovery was suffered by a tenant for life and remainderman in tail in 1781. The record stated that the tenant to the præcipe called to warranty the tenant for life, who appeared by his attorney, and warranted the tenant in tail, who appeared in person.—*Held*, that the recovery was valid, though the record did not state a summons to warranty, nor a warrant of attorney to authorise the appearance for the tenant for life. *R. Stewart v. The Marquis of Conyngham* 535

## REDEMPTION.

1. Upon a lease for lives with covenant for perpetual renewal, more than one year's rent being due, and the landlord being a minor and ward of this Court, the Master directed an ejectment for non-payment of rent to be brought against the plaintiff (the tenant), and certain mortgagees of his interest, upon which ejectment judgment was by consent obtained, and an *habere* executed on the 28th of May 1847. The lessors of the plaintiff in ejectment on the same day demised the lands to A B (a relative of the plaintiff and creditor as against his estate), for six months pending redemption, during which time the plaintiff was in fact allowed to occupy the lands. The mortgagee being entitled to three months' further time to redeem, the forfeiture could not have become complete until the 28th of February 1848, during which period the last *cessu que vie* named in the lease died. Upon the 28th of February 1848, at the instance of the mortgagees the Master made an order directing that certain bills payable three months after date, drawn by the plaintiff and accepted by A B, should be received "on the part of the minors as payment of the rent for

D †

which *habere* executed, and a further half year; if bills not paid, the forfeiture to be complete."

The solicitor for the minor and his testamentary guardian objected to this order at the time of its being made, but took the bills, and on their arrival at maturity and non-payment caused them to be protested. The minor, who was near the attainment of his full age, immediately upon hearing of the order expressed his approbation of it. The plaintiff continued in undisturbed possession during the currency of the bills, and on their non-payment refused to deliver up possession of the lands. An ejectment on the title was brought in the Common Pleas on part of the landlord, by direction of the Master, against the plaintiff and the mortgagees, to which the plaintiff alone took defence, but a verdict was obtained against him; he then moved that the verdict should be set aside, but failed in this also, and judgment was recovered against him. He then filed his bill in this Court, offering to lodge in Court the rent and costs, and praying a renewal, redemption, and an injunction to restrain the landlord from enforcing the judgment in ejectment. The mortgagees were not parties to this equity suit. *Held*, that the arrangement made on the 28th of February 1848 was binding, and that if the bills had been paid when due, the plaintiff would have been entitled to relief; but—

*Held also*, that in consequence of the bills not having been so paid, the Court had no power to decree redemption, and that the plaintiff's bill must be dismissed, with costs. *C. Mulloy v. Goff* 27

2. "It cannot be questioned that an eviction (for non-payment of rent) of a lease for lives, with a covenant for perpetual renewal, not only evicts the lease for the actually subsisting life or lives, but also, when the six months allowed for redemption shall have expired, destroys the right to main-

tain a bill in equity for a renewal." *Per Brady, L. C. Ibid* 37

1. A, being entitled to the benefit of certain articles of agreement entered into by the owners of lands situated in Ireland to execute to him a mortgage thereof for £42,000, by a deed executed in 1840, reciting the articles, assigned that sum and all the securities for its payment to trustees upon certain trusts. By a deed executed in England in 1842, also reciting the articles, A, for valuable consideration, assigned the same sum of £42,000, with all the securities for its payment, to M by way of mortgage. The deed of 1842 was registered previously to that of 1840. The memorial of the deed of 1842 described the lands on which the £42,000 was charged, in the same manner as they were described in that deed itself; but neither the deed or memorial mentioned the names of the baronies or parishes in which the lands were situated.

*Sembly*—That the deed of 1842 would have been properly the subject of registry if the memorial had stated the names of the baronies and parishes.

*Held*, that in consequence of the omission from the memorial of the names of the baronies and parishes, the deed of 1842 was not formally registered, and therefore had not gained priority over the deed of 1840.

*R. Gardiner v. Blessington* 64

2. *Held*, that the deed of 1842 was properly the subject of registry.

*Held also*, reversing the decision below, that, notwithstanding the omission from the memorial of the names of the baronies and parishes, the deed of 1842 was properly registered, and therefore had gained priority over the deed of 1840.

*S. C. on appeal. C.* 79

3. "I think it is not at all clear that an assignment of an equitable contract for a mortgage is, under the Acts for the Registration of Deeds in this

country, to be considered as a mere assignment of money." *Per Smith, M. R. Ibid* 70

4. H. K., by an unregistered deed, granted a rentcharge to his daughter. By the daughter's marriage settlement, executed on the following day, to which H. K. was a party, and which recited the grant, the rentcharge was conveyed by the daughter to trustees. The latter deed was registered. H. K. afterwards mortgaged the land, out of which the rentcharge issued, by a deed, which was also registered. *Held*, that the rentcharge, though granted by an unregistered deed, had priority over the mortgage, by reason of the registration of the settlement. *R. Hunter v. Kennedy* 148

S. C. affirmed on appeal. C. 225

*See also JUDGMENT*, 4.

#### RE-HEARING.

*See CHANCERY REGULATION ACT, 41.*

#### REJOINDER.

*See SCIRE FACIAS.*

#### RELEASE.

1. The conuzees of a judgment appointed the conuzor one of his executors; the will was proved by the other executor only; *Held*, that in equity the judgment debt was not extinguished, but was assets in the hands of the executor for payment of his testator's debts; and accordingly that lands of the conuzor, sold subsequently to the rendition of the judgment, were in the possession of a purchaser with notice, liable to the discharge of the judgment debt. *C. Willock v. Dargan* 39

2. W. H. being seised of an estate tail in Whiteacre, certain judgments were obtained against him in 1824. Upon his marriage, subsequently in that year, Whiteacre was settled upon him for life, with remainders over for the benefit of the issue of the marriage; and a recovery was suffered to the

uses of the settlement. In 1825 W. H., by purchase, acquired Blackacre in fee. In 1826 several other judgments were obtained against him. In 1829 the plaintiff agreed to lend to W. H. £2000 upon mortgage of his fee in Blackacre, and his life estate in Whiteacre, provided that the judgment creditors of 1824 would release Blackacre from their judgments, to which they assented, and then (1829) executed a deed-poll, which recited that W. H. being desirous to have Blackacre clear of incumbrances, had requested the judgment creditors of 1824 to release it from the incumbrances thereupon by their judgments; and that they, being satisfied that the residue of W. H.'s lands were a sufficient security for their judgments, agreed thereto; and by the operative part they released, exonerated and for ever discharged Blackacre from their respective judgments, and from all writs of execution and executions, and every other writ then sued out, or thereafter to be sued out, against Blackacre, by virtue of their respective judgments, or otherwise in relation thereto; and they agreed (for their respective judgments only) to indemnify W. H. for all costs, damages and expenses which should at any time be incurred by reason of Blackacre being attached in execution under those judgments. Afterwards W. H. executed the proposed mortgage to the plaintiff. *Held*, that both at law and in equity the operation and effect of the deed-poll of 1829 was to exonerate Whiteacre as well as Blackacre from the rights and remedies of the judgment creditors of 1824. *C. Handcock v. Handcock* 444

3. The statute 11 & 12 Vic. c. 48, s. 72, enacting that the release of any portion of lands in Ireland from any judgment affecting the same shall not nullify or affect the force of such judgment as regards the residue of such lands, or any other property not specially released, does not apply to

releases executed before the passing of that statute. *Ibid*

#### RENEWABLE LEASEHOLD CONVERSION ACT.

1. In a fee-farm grant under the Renewable Leasehold Conversion Act, the Court will frame the covenants so as not to vary the existing rights and liabilities of the parties. Therefore, where it was alleged that since a former renewal there had been a breach of a covenant to keep the premises in repair, the covenant inserted in the fee-farm grant was to keep in repair the premises as they were at the time of that renewal. *R. In re Waldron* 269
2. An original lease and the renewal thereof contained a reservation of £5 yearly for every acre on the premises that should be ploughed, &c., without the consent of the lessor, and so for a lesser quantity, except for the planting of trees, and £5 for every acre of the premises which should be let to any person who should hold any part of certain adjacent lands, and a sum of forty shillings yearly for every tenant or undertenant inhabiting on the premises that should be a Papist, or so reputed, and covenants to fence the lands and to pay the rents and penalties. *Held*, on a petition under the 12 & 13 Vic. c. 105 (Renewable Leasehold Conversion Act)—first, that the lessee was entitled to have the reservation as to the meadow commuted under section 3 of the Act, and that meadow meant meadow at the date of the last renewal. Secondly, that the reservation for letting to persons holding the adjacent lands could not be omitted from the fee-farm grant, or commuted, as it was not a covenant interfering with the proper cultivation of the land within the 3rd section.

Thirdly, that the reservation for every Papist tenant was not illegal, was a subsisting clause within the 1st section, and did not interfere with the proper cultivation of the land, and therefore could neither be omitted or commuted. *R. Mahony v. Tynte* 577

#### RENEWAL.

3. Where the boundaries have been confused, or land has been encroached on by the tenant, the question of boundary or encroachment should be determined before a fee-farm grant is executed under the Renewable Leasehold Conversion Act, either by ejectment, or, if there be an outstanding legal estate (as in this case), by an issue.

Form of the order directing an issue.

*Semble.*—The Court has no jurisdiction on a petition under the said Act to issue a commission to ascertain the boundaries. *R. Ireland v. Wilson* 623

*See also PENAL RENT.*

#### RENEWAL.

1. Permissive waste of a mansion on the part of a tenant is not sufficient ground for refusing a renewal. *C. Mulloy v. Goff* 27
2. “It cannot be questioned that an eviction (for non-payment of rent) of a lease for lives, with a covenant for perpetual renewal, not only evicts the lease for the actually subsisting life or lives, but also, when the six months allowed for redemption shall have expired, destroys the right to maintain a bill in equity for a renewal.” *Per Brady, C. Idem* 37
3. A, being seised in possession of the K. estates for life, with remainder to his son B for life, with remainder to C (grandson of A) in fee, all three joined in a demise, by indenture, of a small portion of the K. estates, and of certain mills erected thereon, and the rights, easements, and appurtenances belonging to those mills, together with the grist, toll, mulcture, or succon, or other mill duties usually paid to A by the tenants of all the K. estates, at the rate of one-sixteenth part of the corn ground, as toll or mulcture for grinding; reserving out of the demise all royalties to *A, his heirs and assigns*, with liberty for A, B and C, according to their respective interests, and their heirs and assigns, to enter for the purpose of availing themselves

of the royalties at any time during the demise, at the pleasure of *A, his heirs and assigns*; to hold during three lives, and such lives as should be added in pursuance of a covenant for perpetual renewal thereafter contained. By the *reddendum* clause the rent was reserved as to part of the demised premises to A, B and C, according to their respective interests, their heirs and assigns, and as to the residue of the demised premises, to *A, his heirs and assigns*. There followed, however, a covenant by the lessees to pay the rent of all the demised premises to A, B and C, according to their respective interests, their heirs and assigns. The lessees also covenanted to grind, toll free, all corn for the household of A, B and C, their heirs and assigns, in such of the mills as *A, his heirs and assigns*, might send it to; and to grind corn for all the tenants of the K. estates at a charge of one-sixteenth of the grain ground. Then followed a covenant by *A, for himself, his heirs and assigns*, that all the present tenants of the K. estates were bound, and that all the future tenants should be bound, to bring their corn to be ground at that rate at the demised mills, and that in default of the tenants so doing, *A, his heirs and assigns*, would permit legal proceedings to be taken in their names in order to compel the tenants so to bring their corn to be ground, &c., and would produce the counterpart of their leases for that purpose. Next came a covenant for perpetual renewal by *A, for himself, his heirs and assigns*; and finally, covenants by A, B and C, for themselves, their executors, administrators and assigns, for quiet enjoyment, and for further assurance, such further assurance to contain no covenant or warranty that was not already contained in the lease. Indorsed upon the lease previously to its execution was a memorandum, that if any of the tenants of the K. estates were not bound by their present leases to grind their

corn at the mills, *A, his heirs and assigns*, should not be liable to compensate the lessees of the mills if such tenants were not so bound, and neglected to grind their corn at the mills.

The lands demised were, without the profits arising from the mills, wholly inadequate to meet the amount of rent reserved. A and B and some of the *ceux que vivent* having died, a bill was filed, and a decree for a renewal was pronounced against C.

*Held*, that C was not bound to enter, in the new lease, into the covenants with respect to the mill duties, contained in the original lease on the part of A, his heirs and assigns.

*Held also*, that C was bound to enter, in the new lease, into all the covenants into which he had entered by name in the original lease.

*Sembler*, that if the demise by A, B and C had not been as well for all future lives to be added to the lease as for the original lives, C would not have been bound to renew by the covenant for perpetual renewal on the part of A, his heirs and assigns.

*Held also*, that C having alleged, in his answer, breach of covenant by the lessees as a defence to the bill for renewal, and having failed in proving it, must pay the costs occasioned by that defence.

A covenant for a renewal is a covenant to grant an estate, and implies the insertion of such covenants as are incidental to the legal estate, having regard to the tenure; and a covenant for a lease contains a contract that it shall be accompanied by the ordinary covenants. The party renewing is bound to give that which those from whom he derives were bound to, and did, give by the original contract.  
*C. Vance v. Ranfurley* 321

4. Although a sub-lease of church lands and tithes, containing a *toties quoties* covenant on the part of the sub-lessor to renew, does not contain a mutual covenant on the part of the sub-lessee to accept a renewal, the latter is not

thereby prevented from filing a bill in equity to obtain a renewal. C. *Morgan v. Gurly* 482

5. Where there is a lease of church lands and tithes by an Ecclesiastical Corporation, and a sub-lease of part thereof by the first lessee, with a *tities quoties* covenant for renewal, on the terms of the sub-lessee paying his proportion of such fines, costs and charges as the first lessee should have to pay in obtaining a renewal of his interest, and there is not a mutual covenant on the part of the sub-lessees to accept a renewal, delay on the part of the sub-lessee in taking out a renewal, and paying such proportion when required by notice so to do by the first lessee, at a time when he has been called upon by the Ecclesiastical Corporation to renew and pay the necessary fine, is a circumstance which will be taken into consideration by a Court of Equity on a bill filed by the sub-lessee for renewal. *Ibid.*
6. *Semble*—In such a case, if the sub-lease be put in settlement, notice by the sub-lessor to the tenant for life, under the settlement, will be sufficient, without giving notice also to the trustees of the settlement. *Ibid*
7. What will be sufficient laches to work a forfeiture of the right to a renewal of such a sub-lease, considered. *Ibid*

#### RENTS.

*See* CHARGE, 1.

PENAL RENT.

RECEIVER, 4.

#### RENTCHARGE.

*See* PRIORITIES.

#### SALE UNDER THE COURT.

*See* TITLE.

#### SCIRE FACIAS.

1. A rejoinder falsely traversing matter of inducement contained in a replication to a plea to a *scire facias* upon a receiver's recognizance, taken off the file, with costs. C. *The Queen v. Foot* 9
2. A *scire facias* under O'Neill's Act,

#### SCIRE FACIAS.

issued subsequently to the execution of the above mentioned release (*See RELEASE, 2*) and to the death of W. H., at the suit of one of the above mentioned judgment creditors of 1824, against the three infant daughters of W. H. (who were tenants in tail of Whiteacre under the marriage settlement of 1824) as his co-heiresses-at-law, and against certain other persons as terrenants of Whiteacre. The Sheriff in his return stated that he had summoned the three infants, "co-heiresses of the above named W. H., deceased," and also that he had summoned the terrenants of Whiteacre specially named in the *sci. fa.*, and testified that there was not any other heir or heiress of W. H., and that he (the Sheriff) had not served any other terrenants of Whiteacre, or of any other lands of W. H., except those specially named in the *sci. fa.*. Judgment of revivor was obtained on default.

*Held*, that the original judgment was by the revivor re-established as against Whiteacre, and that the infants, having premitted their opportunity of pleading the release to the *sci. fa.*, could not afterwards set up that release as a defence in equity against raising the amount of that judgment out of Whiteacre. C. *Handcock v. Handcock* 444

3. Where, subsequently to the statute 13 & 14 Vic. c. 51, a *scire facias*, at the Petty-bag side of the Court of Chancery, upon a recognizance entered into by a surety for a tenant of lands, which were the subject of a suit at the Equity side of the Court of Exchequer, after reciting the recognizance, proceeded thus:—"As by the said recognizance, which was on, &c., in, &c., duly enrolled in her Majesty's said Court of Exchequer, and now remaining as of record in our said Court of Chancery, by virtue of the statute in that case made and provided, might appear," to which *sci. fa.* the defendant pleaded that the Court of Chancery ought not to have or take

further cognizance of the action, because the recognizance was on, &c., duly enrolled in the Court of Exchequer, whereby that Court then and there acquired, and still retained and possessed, full jurisdiction and authority to award execution against him for the said sum of, &c., according to the tenor and effect of the recognizance, and which plea concluded with the following averment, viz., "that there is not any such record of the said supposed recognizance now remaining in her Majesty's said Court of Chancery as in said writ of *sci. fa.* is above alleged; and this the said defendant is ready to verify, wherefore he prays judgment whether this Court can or will take further cognizance of the action aforesaid." Upon a motion at the Petty-bag side to take this plea off the file as irregular, as not having been verified by affidavit, and as being false and frivolous, this Court refused to make any rule.

Under the concluding part of the 13th section of the statute, such recognizances may, upon agreement between the Lord Chancellor and Lord Chief Baron, be delivered over to such persons as may be appointed by the Master of the Rolls; *sed quære*, whether recognizances, so transferred, become records of, and capable of being sued upon in, the Court of Chancery, unless perhaps by the Crown under its special privilege to select its Court? C. *The Queen v. Jones* 524

## SECURITY FOR COSTS.

1. An officer on half-pay resident abroad is not privileged from giving security for costs. R. *Long v. Tottenham* 127
2. When a plaintiff becomes liable to give security for costs, after answer, the filing of the replication will not preclude the defendant from obtaining the order. *Ibid*
3. The defendant became aware of the plaintiff's liability to give security for costs on the 25th of June, but did not

serve notice of motion until the 29th of October. *Held*, not too late. *Ibid*

4. But *Semble*, the notice should be served before the time for answering has expired, if it expire in the Vacation. *Ibid*
5. The cases and practice as to security for costs considered. Form of the order. *Ibid*
6. Where an answer is not required by the notice of a cause petition, the respondent may move for security for costs at any time before he takes a step in the cause, and before the petition is set down in the Lord Chancellor's list for hearing. R. *Long v. Long* 618
7. But if interrogatories be annexed to the petition, and the respondent is required to answer them by the notice, he must move for security for costs before he takes a step in the cause, and before the time for answering has expired. *Ibid*
8. In England the motion for security for costs may be made at any time before the defendant takes a step in the cause; in Ireland at any time before he has taken a step in the cause, unless he is in contempt. *Ibid*

*See* NEXT FRIEND.

## SEPARATE USE.

*See* DEED.

DEVISE.

## SETTLEMENT.

1. In an antenuptial settlement conferring considerable benefits upon the husband in the property of the wife, to which it chiefly related, which settlement contained a recital that it was made by the wife "in consideration of the marriage and of the provision thereafter made and provided for her by the husband," he covenanted "that whatever estates and property, whether real or personal, and wherever situate, or either or both, should in the event of his decease, if the wife should survive

him, be charged and chargeable with, and subject to, the payment of an annuity or yearly rentcharge of £250, to be paid and payable to her and her assigns during so many years as she should live, besides and in addition to the provision hereby made and intended for her." With the exception of a contingent reversionary interest in a policy of assurance for 3000 on the life of the husband, which policy was subject to a debt of £2000 and interest thereon at £4 per cent., there was not any provision made out of his property for her beside the annuity of £250. At the period of the marriage he was engaged in trade, and was seized of the real estate; subsequently he acquired other real estate, and afterwards became a bankrupt. *Held* that the annuity of £250 was well charged both upon the real estate of which he was seized at the marriage, and upon the real estate which he subsequently acquired. C. *White v. Anderson*

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2. By an antenuptial settlement monies, the property of the wife, were settled in trust to pay the interest to her during her life, and in the event of her death in the lifetime of her husband, then as to the principal, in trust as she should appoint; and in the event of her dying without appointing and without issue surviving her, then "in trust for the persons legally entitled thereto as the next-of-kin to the wife," free from the control or debts of the husband. The wife died in the lifetime of the husband without leaving any issue surviving her. She was survived by a brother, a sister and a niece (the only child of a deceased brother). *Held*, that the niece was entitled to one-third part of the monies. C. *Kidd v. Frasier*

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*See PORTIONS.  
REGISTRY, 4.*

#### SETTLEMENT, REFORMING.

The draft of a marriage settlement did not contain a covenant as to an

#### SPECIFIC PERFORMANCE.

annuity of £250 which was to be settled on the intended wife, but on the draft was indorsed a memorandum, in the handwriting of the husband, stating that the solicitor, who prepared that draft, "had omitted to insert a clause subjecting whatever property he (the husband) might die possessed of to a yearly rentcharge of £250 for the benefit of his intended wife during her life, exclusive of such other advantages as she might be entitled to by the foregoing deed." On the death of the husband a bill was filed (by a party claiming under a mortgage of both estates, and of a date puisne to the settlement), praying that the covenant might be reformed in conformity with the memorandum. The widow in her answer resisted the reformation, and denied that it ever was her understanding of the marriage contract that the operation of the covenant was to be limited to such property only as the husband might die possessed of. The parol evidence of three trustees of the settlement was to the same effect; one of them deposed that to him, both at and after the marriage, the husband had stated his intention that the estates which he then possessed, or should thereafter acquire, should be subject to the annuity of £250. *Held*, that the bill should be dismissed, without costs, and that a declaration should be inserted in the decree that the annuity was well charged upon the estates of which the husband was seized both at and after the marriage. C. *White v. Anderson*

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#### SOLICITOR.

*See ARREST.*

*LIEN.*

#### SPECIAL CASE.

*See CHANCERY REGULATION ACT,  
16, 17, 18, 19, 20.*

#### SPECIFIC PERFORMANCE.

- After exceptions allowed to the Mas-

ter's report of good title in a suit for specific performance, the practice is not to discharge the purchaser, but at the request of the plaintiff to refer it back to the Master to review his report, and to inquire whether a good title can be made to the lands. *R. Stewart v. The Marquis of Conyngham* 535

2. Husband and wife may maintain a suit for specific performance of an agreement by them with a third party for the sale to him of lands, whereof the husband is seised in right of the wife. *C. Fenselly v. Anderson* 706

#### STAYING SUIT.

1. Where an order for a sale of lands has been made by the Commissioners for the Sale of Incumbered Estates, and a certificate thereof has been transferred to the Court of Chancery, the latter Court is bound by the 42nd section of the statute 12 & 13 Vic. c. 77, to stay all suits or proceedings in which a decree for sale of the same lands has been pronounced; but where no such decree has been made, that section leaves it at the discretion of the Court whether or not to stay any other suits and proceedings, even although their object should be to procure a decree for a sale of the same lands. *C. Bernard v. Bond* 198

2. A creditor's suit for the administration of the real and personal estate of a deceased testator was in the list for hearing at the time of the institution of a suit by a legatee, who could have obtained substantial relief in the creditor's suit, in which, shortly after, a decree to account was pronounced. Subsequently, on the petition of a creditor the greater part of the real estate of the testator was ordered by the Incumbered Estates Court to be sold. This Court, being of opinion that the legatee's suit was oppressively and wantonly instituted, refused with costs a motion under the statute 12 & 13 Vic. c. 77, s. 42, on behalf of the

legatee to stay his own suit, and ordered that, if he did not file a replication within a short specified period, his bill should stand dismissed, as against one of the principal defendants, with costs, including the costs of a contemporaneous motion made on her behalf, for its dismissal for want of prosecution.

The construction of the 42nd section of the statute 12 & 13 Vic. c. 77, adhered to, as laid down in *Bernard v. Bond* (*supra*, 1), in reference to staying proceedings in this Court, when lands, the subject of litigation here, have been ordered by the Incumbered Estates Court to be sold. *C. Moneypenny v. Gibbings* 201

*See CHANCERY REGULATION ACT, 13.*

#### STATUTE OF LIMITATIONS.

*See LIMITATIONS.*

#### SUMMARY ORDER.

*See CHANCERY REGULATION ACT, 1, 2, 4, 5, 7, 8, 9, 11, 25.*

#### SUPPLEMENTAL ANSWER.

1. Leave given to a mortgagee defendant to file a supplemental answer to a cause petition varying in some measure the statement of his title to the mortgage as put forward in his original answer, and putting in issue a deed under which he claimed, but which he had forgotten to mention in his original answer. *C. Glascock v. Ross* 50
2. *Semble*.—Mere inconsistency between the proposed matter of defence and the original defence is not sufficient ground for refusing leave to a defendant to file a supplemental answer. *Ibid*

#### TIMBER.

1. The particulars of sale stated that the timber on the estate would be included in the purchase. Title was not made out to the timber on a very small portion of the lands. There being no

E †

misrepresentation, the Court referred it to the Master to inquire whether the timber on that portion was material to the possession and enjoyment of the estate. *R. Stewart v. The Marquis of Conyngham* 535

## TIME TO ANSWER.

*See CHANCERY REGULATION ACT,*  
34, 35.

## TITHE.

1. Where lands were not formerly in the possession of the dissolved monasteries, unity of possession of the lands and tithe will not extinguish the tithe. Therefore where the petitioner derived title under a lease for lives renewable for ever of lands, and the tithes thereof, made in 1700, the Court refused to declare the lands tithe free (on a petition presented under the 1 & 2 *Vic.* c. 109, s. 16), though no tithe had been paid since 1700, there being no proof that the lands were Abbey lands, and no notice of the proceedings having been given to the reversioner. *R. Denny v. Duke of Devonshire* 401  
*Vide infra*, 3, 4, 5.
2. A receiver cannot be appointed or extended over tithe rentcharge by petition under the 5 & 6 *W. 4.* c. 55, or 3 & 4 *Vic.* c. 105. *R. Lymberry v. Helsham* 633
3. A demise of lands and the tithes thereof does not necessarily mean a demise of lands and a demise of tithes as separate and independent properties, but may, if the circumstances of the case warrant such an interpretation, be construed to mean a demise of lands tithe free. *C. Denny v. Devonshire* 657
4. The 20th section of the statute 1 & 2 *Vic.* c. 109, enacting that the provisions thereinbefore contained, "with respect to the establishment of exemption, &c., from tithes, shall not extend to any case where the tithes of any land shall have been demised by deed for any term of life or years, or where any composition for tithes

## TITHE.

shall have been made by deed or writing, by the person entitled to such tithes, with the owner or occupier of the lands, for any such term for life or years, and such demise or composition shall be subsisting at the time of the passing of the Act, nor to any suit for establishing a claim to tithes then pending," means that the exempting clauses of the statute are not applicable to the case of the owner of tithes demising them to the owner or occupier of the land chargeable with those tithes; but a person actually entitled to the common ownership both of lands and the tithes thereof is not, merely because he has derived his title under a lease making separate demises of each, disentitled by that section to hold the lands tithe free.

*Ibid*

5. Where petitioners under the statute 1 & 2 *Vic.* c. 109, s. 16, praying that Whiteacre should be declared tithe free, alleged that those lands had constituted part of the possessions of the monastery of D. and were held by the Friars and Abbots free from tithes; and that under a commission issued in the 18 *Eliz.* an inquisition was held, and the jury found that one hundred and fifty acres of land in Whiteacre, with the tithes of the same, formed parcel of the possessions of the monastery of D., and had been concealed from the Queen and her progenitors; and the petitioners also alleged that by letters patent in the 19 *Eliz.*, one hundred and fifty acres of land in Whiteacre, and the tithes of the same, were granted to W., under whom the petitioners alleged that they derived by lease made in the year 1700, demising Whiteacre and the tithes thereof for three lives, with a covenant for perpetual renewal; and stated a composition made in 1833, and a certificate of the Commissioner certifying the composition of the parish in which Whiteacre was situate (of which £47 was assessed on Whiteacre), and also certifying that it was payable to the respondent; and

the petitioners also alleged that for sixty years anterior to the composition, Whiteacre was held by the owner and the tenants thereof tithe free. The respondent denied that Whiteacre was part of the possessions of the monastery, and insisted that even admitting the statement of the petitioners as to the one hundred and fifty acres to be true, it only led to the conclusion that to that extent alone were the lands of Whiteacre tithe free. The Court referred it to the Master to inquire whether Whiteacre was rightly charged with tithe composition if the statute 1 & 2 Vic. c. 109 had not passed, or if such composition had not been suspended. Evidence was entered into on both sides and tendered to the Master, who declined to consider it; and inasmuch as it appeared on the petition and the charge that the lands and tithes were separately demised by the lease of 1700, he found that Whiteacre would have been rightfully charged with tithe composition if the statute 1 & 2 Vic. c. 109 had not been made, or if such composition had not been suspended. The Court (being of opinion that the lease of 1700 was susceptible of being construed to mean a demise of Whiteacre tithe free, and inasmuch as the respondent had not in his discharge rested his defence upon the view adopted by the Master, but had denied the title of W., the lessor of the petitioners) directed the Master to review his report, but ordered that notice of all further proceedings should be given to the person entitled to the reversion on the lease of 1700, who had not previously been made a party in the matter. *Ibid*

## TITLE.

1. An agreement by the vendors to let to the vendees for the term of sixty-one years the premises then occupied by the vendors, "as held under A B," does not absolve the vendors from the duty of proving the title of their lessor A B. *C. Leathem v. Allen*

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2. And, on its appearing that A B was himself only a lessee for three lives, with a covenant for perpetual renewal, *Held*, that the vendors could not make good title to grant a lease for a term of sixty-one years. *Ibid*
3. *Held also*, that the fact of other premises (besides those proposed to be let by the vendors) being comprised in the lease to A B, was a fatal objection to the title. *Ibid*
4. Where there is an agreement by a vendor having a derivative estate in lands, *to let* them for a term of years, and such an agreement, if carried into execution, would operate not as a lease, but as an assignment of the vendor's estate:—*Quare*, whether specific performance of the agreement will be decreed against the vendee? *Ibid*
5. An agreement "to sell the interest of A B in the lands of Whiteacre" does not absolve A B the vendor from the necessity of proving his lessor's title. Nor is there any waiver of that necessity by the mere fact of the vendee having taken possession of the lands before production of the lessor's title. *C. Wright v. Griffith* 695
6. Where an agreement for sale of a leasehold is silent as to the production of the lessor's title, parol testimony is admissible in proof of facts and circumstances constituting a waiver by the vendee of production of the lessor's title. *Ibid*
7. *Sembler*—that if such a waiver be proved, the Court will declare it to be established, although the bill contains no prayer to that effect. *Ibid*

8. A contract for sale of "the lessee's interest" in a lease does not exonerate the vendor from the necessity of proving the lessor's title to grant the lease. *C. Fennelly v. Anderson* 706

*See* SPECIFIC PERFORMANCE.

## TRADER.

*See* BANKRUPT, 1.

752 TRUST & TRUSTEE.

TRUST AND TRUSTEE.  
*See TRUSTEE RELIEF ACT.*

VESTING.

*See PORTION.*

WARD OF COURT.

"I may observe, that previously to the Court of Chancery (Ireland) Regulation Act 1850, no step could be taken in a minor matter without a petition. Under that statute minors may be made wards of Court by cause petition ; and if they were now made wards of Court by a cause petition instead of an ordinary petition, all subsequent orders might be made on motion and without petition, and expense would thus be saved to minors' estates."—*Per SMITH, M. R. Hart v. Carleton* 231

WARRANTY.

*See RECOVERY.*

WASTE.

To break up a rabbit-warren, unless it

WILL.

be a warren by charter or prescription, is not waste at Common Law, and the Court will not grant an injunction to prevent it.

*Quare, if the warren be demised as such ? R. Lurting v. Conn* 273

*See RENEWAL.*

WIFE.

*See HUSBAND AND WIFE.*

WILL.

Where a will terminated with a *testimonials* clause about two inches from the foot of the second page of a sheet of paper, leaving ample room for the signatures both of the testatrix and the witnesses, all of whom, however, signed their names opposite to an attestation clause at the top of the third page, upon which no part of the will was written ; *Held*, that the will was properly signed within the meaning of the statute 1 & 2 Vic. c. 26. Ct. of Del. *Derinzy v. Turner* 341

C. F. J.











